Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT THOMPSON and BRAD BAILEY,
Petitioners,

vs.

ROD BOGGS, a Police Officer of the City of Havana,
KEVIN W. NOBLE, a Police Officer of the City of Havana, then
Chief of Police of the City of Havana,
and the CITY OF HAVANA, ILLINOIS.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Does the interpretation of *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571 (1986) *per curiam* as requiring the holding that an erroneous grant of summary judgment in favor of a municipality in a Section 1983 excessive force action on a *Monell* claim of a policy of deliberate indifference to individual officer's use of excessive force is harmless error when the officer obtains a defense verdict deprive plaintiff of a fair trial by sanctioning the exclusion of *Monell* evidence relevant to prove that the individual officer in fact used excessive force?

2. Did the court unduly and illogically restrict the right of access to the courts by confirming its prior holding that police officers who intentionally shield the key facts of police wrongdoing by falsifying their police reports deprive the survivors of the survivor of the victim of a police homicide of their right of access to the courts, but holding that the same conduct committed to cover up a police battery does not restrict the living victim's right of access to the courts?

3. Did the affirmance of the district court's refusal to allow plaintiff to present any of his evidence in support of his claim that the City of Havana systemically and completely disregarded the constitutional limits of police use on force in the City of Havana through the abuses of pre-trial and trial procedure identified in the table of contents and discussed in the argument constitute a sanction of a departure of a lower court from the accepted and usual course of judicial proceedings so far that it requires an exercise of this Court's power of supervision?

4. Did the misstatements of the record and holdings by the court of appeals in its opinion identified in the table of contents and discussed in the argument constitute a departure from the accepted and usual course of judicial proceedings so far as to call for an exercise of this Court's power of supervision?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the caption and in all U.S. District Court papers contained in the Appendix.

No business or not for profit corporations were parties to this action below or are named as respondents in this petition for writ of certiorari. An Illinois municipal corporation, the City of Havana, Illinois was a party defendant below and is a respondent to this petition for writ of certiorari.

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CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

Constitution of United States of America

Article IV

The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileged or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress...

Federal Rule of Evidence 402, Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissable

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is admissible.

Federal Rule of Civil Procedure 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals appears in the Federal Reporter, Third Series as *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994).

JURISDICTION

A. Supreme Court Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1). The court of appeals issued its decision and entered judgment on August 31, 1994. Petitioners filed a petition for rehearing including a suggestion for rehearing en banc on September 14, 1994 in accordance with Fed.R.App.Proc. 40 (a). The court of appeals denied the petition for rehearing and suggestion for rehearing en banc in an order entered on November 8, 1994. Petitioners have caused this petition to be mailed on February 6, 1995, the 90th day after the November 8, 1994 denial of their petition for rehearing by the Court of Appeals in accordance with Supreme Court Rule 13.4.

B. Jurisdiction of the Federal Courts Below

1. Plaintiff, Robert Thompson

This was an action brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Jurisdiction in the district court was founded under the provisions of 28 U.S.C. § 1331 and 28 U.S.C. § 1343 (c). The plaintiff then appealed from a final judgment entered in favor of the defendants after a jury trial. The judgment was entered on July 21, 1993. Plaintiff filed a motion for new trial and to alter or amend judgment on July 23, 1993. The district court entered an order denying his motion on July 27, 1993. Plaintiff timely filed a notice of appeal with the district court on August 4, 1993. The court of appeals had jurisdiction under the provisions of 28 U.S.C. § 1291 and Rules 3 (a) & 4 (a) of the Federal Rules of Appellate Procedure.

2. Movant, Brad Bailey

Brad Bailey was plaintiff in an action brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Jurisdiction in the district court was

founded under the provisions of 28 U.S.C. § 1331 and 28 U.S.C. § 1343 (c). Plaintiff, Brad Bailey, filed a motion to join pending action under Fed.R.Civ.Proc. 20 as party plaintiff along with a proposed complaint August 27, 1992. Like the *Thompson* action, the action Bailey sought to file was an excessive force action against Officer Boggs of the City of Havana Police Department. alleging that there was a policy of condoning or encouraging Officer Boggs' use of excessive force under the doctrine of *Monell v. Department of Soc. Serv. of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978).

The magistrate judge entered an order on September 14, 1992 denying Bailey's motion to join the action. The district judge affirmed the magistrate judge's order denying Bailey's motion on October 2, 1992. Bailey filed his complaint separately with the Central District of Illinois as Case No. 92-3303, the action was later dismissed without prejudice.

The order denying Bailey's motion to join pending action as party plaintiff in the *Thompson* action did not become final until a final judgment was entered in the *Thompson* action. Fed.R.Civ.Proc. 54 (b). After the final judgment in *Thompson* action was entered on July 21, 1993, Bailey filed on July 23, 1992, a motion to alter or amend judgment which was denied on July 26, 1993. Bailey filed a notice of appeal in the *Thompson* action on August 4, 1993. The court of appeals docketed the *Bailey* appeal separately from the *Thompson* appeal. It later consolidated the cases and placed both Thompson and Bailey on the same briefing schedule.

The court of appeals had jurisdiction over Bailey's appeal under the provisions of 28 U.S.C. § 1291 and Rules 3 (a) & 4 (a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This was a Section 1983 excessive force action to recover for personal injuries including a fractured back suffered as a result of plaintiff's encounter with defendants, Rod Boggs, a City of Havana, Illinois police officer ("Officer Boggs") and Kevin Noble, also a City of Havana, Illinois police officer ("Officer Noble"). The incident occurred at dusk, approximately 9:15 p.m. on July 29, 1989 in Havana, Illinois, a city of 3,500.

Plaintiff was operating his motorcycle with a passenger. He was being pursued for a traffic offense by Officer Boggs in his squad car and Officer Noble in his squad car. T-30.[1] The pursuit ended at the Mason District Hospital. Officer Boggs followed plaintiff on Harpham Street, which is east of that small hospital. T-229-300. Officer Noble turned left onto Franklin Street, south of the hospital and headed toward the entrance/exit of a large parking lot adjacent to the west side of the hospital. Plaintiff went behind the north side of the hospital with Officer Boggs in close pursuit. T-299-300. Plaintiff then turned his motorcycle south, with Officer Boggs right behind him, and headed through the parking lot toward the Franklin Street exit. T-44. Officer Noble pulled his squad car in front of plaintiff's path of travel and plaintiff collided with the front end of Officer Noble's squad car. T-303, 310-11. His passenger was thrown from the motorcycle and plaintiff fell to the pavement. T-325-56.

Officer Boggs' police report states that "[he] exited his patrol car and restrained Thompson [plaintiff] who appeared was going to get up and run." 65-Ex.B. Officer Boggs' report indicated that plaintiff was transported to the Mason District Hospital, but made no reference to the fact that plaintiff had suffered a T-12-L-1 compression fracture of his vertebrae. Plaintiff's examining physician attributed the fracture to the incident. Flores dep. 14, 29. Noble's report does not mention plaintiff's injuries or Boggs' encounter with him. 65 Ex. B.

Neither Boggs nor Noble's report makes any mention of the numerous witnesses to the incident, who were leaving the Mason District Hospital after a meeting. 65 Ex.B. Chief Hardesty testified that he reads every police report in this small department. He did nothing after reading Officer Boggs and Noble's reports. 65-1 A - dep. 20. None of the witnesses to the incident were listed in Officers Boggs and Noble's reports. 65 Ex. B.

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[1] The references to the transcript of the trial is referred to as "T -" followed by the page number of the transcript. References to documents filed with the district court are referred to by the document number assigned the filing on the district court docket sheet, for example, "7-2", docket number seven, page two. The reading of depositions into evidence at trial was not reported, so references to deposition testimony used at trial is referred to as "Cooper dep, 15". References to the documents filed in the court of appeals are made by abbreviations followed by the part and page number. "Pltf's Br. Part I A, p. 17."

Jeff Cooper was one of those witnesses, who was ultimately interviewed by plaintiff's investigator. When leaving the hospital, he saw a motorcycle go by with a squad car behind. 65-10, 3-6. He noticed another squad car pull in to block the entrance and the motorcycle swerved to avoid him. The car moved up two feet to block the remainder of the entrance. The bike hit the driver's side fender with plaintiff hitting the ground and the passenger flying over the hood. As soon as plaintiff was on the ground, the trailing officer was on him. He saw the officer position Thompson, placing his knee on his back while holding him, and then jumped on him. *Id*, 15-16. He said at the time that it was rough treatment for someone who had been in a wreck. 65-10, 12.

Patty Lynch was another witness interviewed by plaintiff, but not the police. She saw the officer put his knee into the plaintiff's back and made him lay back on the ground. She could see no reason for this, they had already searched him. When the officer put his knee into the boy's back he wasn't attempting to escape nor was he threatening anyone. 65-1E, 16-17.

II. PRE-TRIAL PROCEEDINGS

A. Plaintiff's Complaint and Dismissal of his Denial of Access to the Courts Claims

Plaintiff's complaint asserted these claims:

1. Officer Boggs
    a. Excessive force in making arrest of plaintiff in deprivation of his Fourth Amendment right to bodily integrity.
    b. Denial of plaintiff's right of access to the courts by intentionally omitting the key facts of his excessive force used against plaintiff in deprivation of his right of access to the courts privilege and immunity guaranteed by Article IV and the Fourteenth Amendment, the right of petition guaranteed by the First Amendment, and the substantive due process right to be free from arbitrary deprivation of liberty and property interests by state actors.
2. Officer Noble
    a. Intentional refusal to prevent Officer Boggs' use of excessive force against plaintiff in deprivation of his Fourth Amendment rights.

b. Denial of plaintiff's right of access to the courts by intentionally omitting the key facts of Officer Boggs' use of excessive force against plaintiff.

3. Chief Hardesty

a. Supervisory claim for informal policy of deliberate indifference to Officer Boggs' use of excessive force against persons.

b. Supervisory claim for informal policy of deliberate indifference and participation in police cover up of excessive force by intentionally omitting the key facts of wrongdoing from police reports and the refusal to do any investigation or administration of discipline for the use of excessive force.

4. City of Havana

a. *Monell* claim for Chief Hardesty and later Chief Huber's informal policy of deliberate indifference to Officer Boggs' use of excessive force against persons.

b. *Monell* claim for Chief Hardesty and later Chief Huber's informal policy of deliberate indifference and participation in police cover up of excessive force by intentionally omitting the key facts of wrongdoing from police reports and the refusal to do any investigation or administration of discipline for the use of excessive force.

Plaintiff amended his complaint under Fed.Civ.Proc. 15 (a) when defendants filed a motion to dismiss. 7. The court dismissed the amended complaint on defendants' motion, granting plaintiff leave to amend. 11. The pleadings were resolved in the motion to dismiss plaintiff's second amended complaint. The court sustained the *Monell* claims of deliberate indifference to excessive force, but dismissed the denial of access to the courts claim. The court ruled that plaintiff alleged the failure to include a legal conclusion in the police report that was not sufficient to state a claim for intentional shielding of the key facts of police wrongdoing from the public. 16.

The second amended complaint alleged that Officers Boggs and Noble intentionally omitted any reference to Boggs' act of lifting the plaintiff, who was lying semi-conscious on the pavement posing no threat of injury or escape and threw him down on the pavement onto

his back with great force. 14. Plaintiff also alleged that this omission was done with the knowledge of Chief Hardesty pursuant to a policy of his and later Chief Huber of covering up the use of excessive force by police officers by false police reports. 14-¶ 38-39, 44-45.

B. Denial of Brad Bailey's Motion to Join as an Additional Party Plaintiff

Brad Bailey, a later victim of Officer Boggs' excessive force and later Chief Huber's policies, sought to join the action as an additional party plaintiff. The commentators and every reported case had allowed joinder or intervention under these circumstances. 28. The district court denied the motion for joinder finding that separate instances of the use of excessive force in accordance with a policy of deliberate indifference to that use was not a valid basis for joinder. 29.

C. Summary Judgment on the Seizure Claims Against Officer Noble, Chief Hardesty, and the City of Havana for Noble's Use of his Squad Car to Arrest Plaintiff

The court's rulings on the second amended complaint were entered on May 7, 1992. 18. The deposition of Jeff Cooper was taken on October 19, 1992. Plaintiff took the deposition of Officer Noble on December 4, 1992. He testified that when he saw the motorcycle coming toward him through the hospital parking lot, he turned his vehicle toward the Franklin Street exit to the hospital parking lot in a half moon maneuver. 48- Noble dep. 8. The motorcycle was moving toward Officer Noble's car when he was doing the half-moon maneuver. Officer Noble knew there was a curb and bushes at the exit. He stopped and looked back and saw that the motorcycle was coming. 48-Noble dep. 8 [23-25]. Noble's vehicle was stopped a matter of seconds before the plaintiff turned his motorcycle down and slid toward his car and collided with it. 9 [l 1-2, 7-10].

Plaintiff disclosed W. Ken Katsaris of Tallahasse, Florida as his police practices expert in a supplemental answer to a Rule 26 (b)(4) interrogatory. Mr. Katsaris holds a Master's in Law Enforcement from Florida State, was a policeman, and Sheriff of Leon County, Florida. He has been teaching use of force and police administration nationally for 20 years. One of his significant achievements was the apprehension of Ted Bundy, a serial killer of national notoriety, who was convicted and executed for the murder of two Florida State coeds. T-

111-17. Among the opinions disclosed were Mr. Katsaris' opinion that Officer Noble had violated the Department's own rules by pursuing a traffic offender. 70-3. Defense counsel's February 1, 1993 deposition of Mr. Katsaris includes 48 pages of the transcript devoted to Katsaris' opinion that Noble's use of his squad car to arrest plaintiff was an improper use of deadly force and that there was a policy of not enforcing the City of Havana's Department rule against police pursuit of traffic offenders. 71-Ex.C, Katsaris dep. 15-63.

The final pre-trial conference was set for June 28, 1993. 83. On April 12, 1993, plaintiff filed a motion for partial summary judgment on his claim against Officer Noble for use of his squad car to arrest plaintiff, a seizure under *Brower v. Inyo County,* 489 U.S. 593, 109 S.Ct. 1378 (1989), which did not meet the Fourth Amendment standards for the use of deadly force, an immediate threat of serious physical injury. *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985). Plaintiff also sought a partial summary judgment against Chief Hardesty and the City of Havana for their deliberate indifference to the use of vehicles to effect arrests of traffic offenders. 46.

Defendants responded with a motion for summary judgment contending that since the claim was not included in the complaint, it was barred by the statute of limitations. Plaintiff filed a two-fold reply. First, he demonstrated his disclosure of the *Brower v. Inyo County* claims in discovery under *Ash v. Wallenmeyer*, 879 F.2d 272, 274 (7th Cir. 1989). *Ash* held that the principles of notice pleading embodied in the Federal Rules do not require a plaintiff to amend his complaint to reflect additional claims arising out of the occurrence referred to in the complaint. The plaintiff need only disclose the claims in discovery - which frames the issues under the Federal Rules -- and include the claims in the final pre-trial order. *Id.* Secondly, plaintiff demonstrated that the claims related back to the timely filing of the original complaint under Fed.R.Civ.Proc. 15 (c)(3). All versions of the complaint referred to Officer Noble's use of his squad car to block plaintiff's travel. 1-Cmpl.¶ 19-20; 7 A/C ¶ 19-20; 14 SAC ¶ 19-20. 70-1-3. The court entered summary judgment in favor of the defendants holding that the claims were barred by the statute of limitations because they were not included in the complaint. 80.

D. Summary Judgment on the Supervisory and *Monell* Claims of Deliberate Indifference to Officer Boggs' Use of Excessive Force

Chief Hardesty and the City of Havana's motion for summary judgment was based upon the erroneous legal contention that there must be a prior incident of use of excessive force in order for *Monell* liability for individual officers' use of excessive force to exist. 44-2-4. The contrary holding of *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1378 (1989) was unmentioned. The motion then focused entirely on a prior incident between Officer Boggs and Jay Haas at the Mason County Jail while Haas was in the custody of another department, the Mason County Sheriff's Department. 44-4. Haas had slammed a telephone down. Defendants' contended that there was not triable issue of fact on Officer Boggs' justification for striking Haas on the thigh with his nightstick. Boggs contended that he thought Haas was going to hit him with the telephone. 44-4.

Plaintiff responded by pointing out that defendants' legal contention could not survive *City of Canton v. Harris*, *supra*. He also contended that the motion did not meet the defendants' burden as summary judgment movant to negate all triable issues of fact and inferences from those facts. 54-69. The telephone was attached to a cord, which raised the inference that Haas in fact posed no threat to Officer Boggs. 65-Boggs dep. 80-83. The motion did not negate the inference of Boggs' lack of credibility raised by the inconsistency between his deposition version of the incident and his police report version where he stated that he and a deputy sat Haas in a chair. 65-10, 48-12. Finally, on the Haas incident, plaintiff offered the affidavit of Mr. Haas testifying to Chief Hardesty's admission to him that he has already told Boggs what he did was not acceptable police behavior and that a reprimand would be put in his file. 61-4.

Plaintiff also pointed out defendants failure to address the determinative issue of the Department's response under Chiefs Hardesty and Huber to six incidents of Boggs' use of force in 20 months. 65-10, 65-1E, 58-62. Mr. Katsaris testified that in each of these instances, the accepted standard of care for police practices required an investigation into each incident and consideration of the possibility of discipline against Officer Boggs. He was of the opinion that the City's police reports of the Haas incident, the incident involving plaintiff, and

incidents involving Cynthia Reed and Harvey Riggins, Roy Peters, Danny L. Flaherty, and Brad Bailey each required a police administrator following the accepted standard of police practices to question the propriety of Officer Boggs' use of force requiring further investigation. Since no further investigation was done in any of these six incidents or discipline considered, Katsaris concluded that the policy of Chief Hardesty and later Chief Huber of the City of Havana was to ignore individual officers' use of excessive force. 56. Finally, plaintiff presented the evidence of the Havana City Council's Public Safety Committee's consideration of a petition signed by 51 citizens complaining of Officer Boggs' use of excessive force. Chief Huber told the Committee he thought Boggs' acted reasonably in the six incidents. 65 Huber dep. 35-36. None of the council members had any law enforcement experience. Nor did they inquire of Chief Huber of the legal standard for use of force. 65-C.Lynch dep. 9, Ray dep. 13-14, Huber dep. 45. Nevertheless, the City Council issued a statement at its February 18, 1992 meeting that "we stand 100% behind Officer Boggs and our entire police department and no further action will be taken on the petition." 65-28.

The court granted the motion for summary judgment, finding that Officer Boggs' use of force in the Haas incident as a matter of law was justified. Chief Hardesty's admission was dismissed because Hardesty had testified that he asked Haas to file a complaint and Haas refused. 79-6. The court granted defendants' motion to strike references in Mr. Katsaris' affidavit to the four other incidents subsequent to the Haas incident as dissimilar. 79-3-5, 6. Relying upon the plurality in *Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 105 S.Ct. 2427, 2436 (1985) that was rejected in *City of Canton v. Harris*, *supra,* the district court found that plaintiff offered no more proof of municipal policy than the single incident involving plaintiff. 79.

III. TRIAL PROCEEDINGS

Defendant filed a motion in limine seeking exclusion of a significant amount of evidence in the trial of the excessive force claim against Officer Boggs and Officer Noble for failing to prevent that use of excessive force. 91. Over plaintiff's objection, the court refused to allow admission of evidence of any other incident of Officer Boggs' use of excessive force. The court excluded all evidence of Officers Boggs and Noble's violation of the Department rule prohibiting police

pursuit of traffic offenders. 93-1-2. The court also prohibited the plaintiff from referring to false statements made by Officers Boggs and Noble in their police reports. 93-2. The order noted that "the police reports in question are not 'false' because they are not in agreement with other witnesses... ... The court finds the reports are inadmissible, however, they may be used to refresh recollection." 93-2.

The court directed a verdict in favor of Officer Noble and entered judgment in favor of Officer Boggs on the jury verdict. 99, 108.

IV. PROCEEDINGS BEFORE THE SEVENTH CIRCUIT COURT OF APPEALS

A. Plaintiff's Brief

Plaintiff's main brief identified the error in the dismissal of the access of the courts claim. He also contended that the error was prejudicial in that it denied him relevant evidence admissible under Fed.R.Ev. 402 in the limited trial he received against Officer Boggs. The existence of a municipal policy of intentionally covering up the police use of excessive force made it more likely that Officer Boggs' in fact used excessive force. Pltf's Br, IC, 21; That error was compounded by the order in limine preventing plaintiff from cross examining the officers on false statements in their police reports. 93-3. Pltf's Br. *Id.*

Plaintiff also argued the error of the summary judgment entered in favor of defendants on the seizure claim against Officer Noble, Chief Hardesty, and the City of Havana under *Brower v. Inyo County* Pltf's Br. II, 22-27. Plaintiff next contended there was error in the grant of summary judgment on the supervisory claim against Chief Hardesty and the *Monell* claim against the City for the policy of deliberate indifference to the use of excessive force. Plaintiff expressly argued that the error was prejudicial in the trial against Officer Boggs that he did receive because it denied him relevant evidence admissible to prove Officer Boggs in fact used excessive force. A municipal policy of deliberate indifference to the use of excessive force makes it more likely that individual officers will use excessive force. Pltf's Br., Part III, D, 39. Plaintiff also asserted error in the refusal to allow Bailey to join the action. Part IV. 39-42.

B. Defendants' Brief

Defendants argued that the evidence supported the defense verdict. They also contended that the error was harmless for two principal

reasons. First, the verdict in favor of Officer Boggs was conclusive on the lack of a constitutional deprivation. Defs' Br. Part III, p. 22 citing *Collins v. City of Harker Heights*, 106 S.Ct. 1571 (1986). Secondly, defendants contended that the district judge had virtually unlimited discretion to issue pre-trial and evidentiary rulings that keep from the jury the evidence required to prove a violation of the Civil Rights Act, 42 U.S.C. § 1983. Defs' Br. Parts I-IV, VII.

C. Plaintiff's Reply

Plaintiff's reply argued that the harmless error rule could not be applied to erroneous pre-trial dismissals of the access to the courts claims and the supervisory and *Monell* claim of deliberate indifference to the use of excessive force. The dismissals denied plaintiff evidence relevant to prove that Officer Boggs in fact used excessive force. Reply; I-A, A, 3-5. Plaintiff also focused on *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571 (1986), the appropriate case for defendants' harmless error requirement.

Plaintiff contended that *Heller* could not be applicable because the verdict in favor of the police officer was obtained in a trial that was unfair because plaintiff was denied relevant evidence of municipal policy, which made it more likely that Officer Boggs or Chief Hardesty and the City, or both committed constitutional deprivations. Reply, Part I A, B, 5-6. He relied upon *Moss v. City of Colorado Springs*, 871 F.2d 112, 113-14 (10th Cir. 1989) for the proposition that *Heller* does not control when the officer's verdict has been obtained in an unfair trial. *Id.* Plaintiff also referred to an earlier case that *Monell* imposes no requirement that municipal liability be conditioned on individual liability. *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992). *Id.* While the case was under advisement, plaintiff cited the court to the Third Circuit's decision in *Fagan v. City of Vineland*, 22 F.3d 1297 (3d Cir. 1994) (en banc) holding that *Heller* was inapplicable to a similar excessive force case because the plaintiff in that case was predicating municipal liability on respondeat superior, not on the existence of a municipal policy of deliberate indifference to the use of excessive force. Reply *Id.*

D. The Panel Opinion

1. Misstatement of the Record in Affirming on the Basis of Denial of Plaintiff's Motion to Amend Second Amended Complaint, Which in Fact was Never Filed

The panel opinion misstated the record in its statement of facts and in its holding affirming the summary judgment entered on the *Brower v. Inyo County, supra,* seizure claim against Officer Noble, Chief Hardesty, and the City of Havana. The court stated that plaintiff moved for leave to amend his complaint a third time to specifically assert the claims when faced with defendants' response that the claim was not in the complaint. Slip Op. at 5; 33 F.3d at 850 It then held that the denial of leave to amend the complaint was not an abuse of discretion. Slip Op. III B, 10, 33 F.3d at 853-54. Plaintiff never moved for leave to amend his complaint a third time. Plaintiff had identified the claim in discovery and it related back to the complaint under Fed.R.Civ.Proc. 15 (a)(3). Under the Seventh Circuit's interpretation of the Federal Rules in *Ash v. Wallenmeyer*, 879 F.2d 272, 274 (7th Cir. 1989) the district court was required to consider the claim on its merits, since it is discovery that frames the issues under the Federal Rules, not the pleadings. Plaintiff raised this misstatement of the record by a petition for rehearing and a motion to strike a misleading reference in defendants' response. Pet. Part III, (Mot. to Strike, appended). The court denied the motion to strike and the petition for rehearing without comment.

2. The Court Also Misstated the Record and the Facts of *Bell v. City of Milwaukee* in Affirming the Dismissal of the Access to the Courts Claims

The court ruled that plaintiff had not stated a claim for deprivation for access to the courts under its decision in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). Again, the panel made a misstatement of the record, both of this case and of *Bell.*

The court stated that since plaintiff lived through the police battery, he had first hand knowledge of the events and the intentionally false police reports of Officers Boggs and Noble did not restrict his right of access to the courts. Slip Op. 9; 33 F.3d at 852. Plaintiff alleged that he was semi-conscious at the time of the occurrence. 14-25. Had there

not been a policy of covering up police use of excessive force as alleged, there could well have been many more independent witnesses than Jeff Cooper and Patty Lynch, similarly testifying to Boggs' use of excessive force. As it was in the trial that plaintiff received, defendant called one favorable witness to the incident, Jeff Cooper and a more equivocal one, Patty Lynch.

The opinion also misstated the facts of *Bell v. City of Milwaukee*. The survivor of Daniel Bell, the victim who was recklessly shot by the police in *Bell*, his father, Dolphus Bell, had in fact filed a state lawsuit after his death. 746 F.2d at 1222. Mr. Bell refused to accept a tendered nominal settlement of the case resulting in its dismissal in 1965. *Id.* at 1223. The federal action was brought by the survivors of Adolphus Bell after a participant in the police cover up confessed 20 years later and the perpetrator was convicted of reckless homicide. *Id.* at 1223-24.

3. The Court Again Misstated the Record in this Case on the Summary Judgment While Principally Relying on *City of Los Angeles v. Heller* to Hold the Grant of Summary Judgment was Harmless Error

(a) The Court's Misstatements of the Record on Summary Judgment

The Court made no mention of the failure to apply the summary judgment movant's burden of negating all triable issues of fact and inferences favorable to plaintiff. Nor was any mention made of Mr. Katsaris' opinion testimony on the inadequacy of Chief Hardesty and later Chief Huber's response to Officer Boggs' six uses of force within a 20 month period in this small city of 3,500 or those six incidents themselves. Finally, there is no mention of the evidence of the City's inadequate response under any of the recognized tests for *Monell* liability for inaction to police use of excessive force. Pltf's Br. Part III, 27-39. Slip Op. 22-23, 33 F.3d at 858-59.

The opinion's reference to the self-serving affidavit of Chief Hardesty that he reviewed police reports and disciplined officers where he thought necessary is downright misleading. Slip Op 22-23; 33 F.3d at 858-59. The Chief's own conduct and that of his successor showed no investigation of six incidents of Officer Boggs' use of force

was ever done. It also ignores the compelling and contradictory opinion evidence of plaintiff's nationally recognized police practices expert, Mr. Katsaris, that each of the incidents warranted investigation under the accepted standard of police practices. 56 ¶ 9.

(b) The Panel's Factual Finding That Plaintiff's Own Conduct Justified his Injuries

The panel determined that plaintiff's own conduct of fleeing and eluding justified the injuries the police inflicted upon him. Slip Op. 15; 33 F.3d at 855. But the panel and more importantly the jury never heard plaintiff's evidence of the incident. Mr. Katsaris found the repeated violations of the Department's rule prohibiting police pursuits inexcusable. 56-11. Officer Boggs followed plaintiff without his headlights on or lights flashing so close that it caused plaintiff to speed up his vehicle in the first place. T-29. Plaintiff reached the conclusion that I am already in trouble so I might as well try to avoid it altogether. This evidence together with Officer Boggs' complete disregard of the Department rule prohibiting police pursuit of traffic offenders could have lead the jury to conclude that Officer Boggs used excessive force against plaintiff to punish him or as a part of vendetta. Pet. for Reh. Part V. The jury did not hear this evidence and the panel chose to disregard it.

(c) The Omission of Plaintiff's Repeated Contention that Evidence of the Existence of a Policy of Deliberate Indifference to Officer Boggs' use of Excessive Force was Relevant to Show Boggs' Use of Force was Excessive and Mistaken Application of *City of Los Angeles v. Heller*

The court held that the jury's finding that Officer Boggs had not used excessive force against plaintiff was a finding that there was no constitutional deprivation. Citing *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571 (1986), the court held that such a finding rendered the error on the summary judgment on the *Monell* claims harmless. The court noted the Third Circuit decision in *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994) holding that *Heller* was inapplicable to the excessive force case there because it was decided on a claim that the City was liable under *respondeat superior*. The panel rejected that position following *Heller*. A verdict in favor of the officer is a finding that there is no constitutional injury eliminating any

necessity of trying a *Monell* claim against the municipality. Slip Op. 22-24, 33 F.3d at 858-59.

Plaintiff had maintained in his main brief and his reply brief that the evidence sufficient to create a triable issue of fact on the *Monell* claim was relevant to prove Officer Boggs in fact used excessive force. Pltf's Br. III D, p. 39; Reply I-A, A, 1, p. 3, IV A, p. 20. The opinion makes no mention of that contention.

4. The Court's Silent Rejection of the Unanimous Authority Allowing Other Victims of an Alleged Policy of Constitutional Deprivations to Join or Intervene in the Action of Another Victim of Such Policy

Prior to this decision, every court considering the question of joinder or intervention of victims alleging injury from the same policy or conduct at issue in a present civil rights case had held that joinder or intervention must be allowed. 7 Wright & Miller, Federal Practice & Procedure § 1656, n. 25 & 26, (1994 Supp. n. 25, p. 39), 7C Wright, Miller, & Kane, § 1911, n. 18 p. 364-66, n. 20, pp. 366-67 (1994 Supp. § 1911, n. 18, p. 33). However, this court held that it was not an abuse of discretion to depart from that unanimous authority and the plain language of the Rule to deny Bailey the opportunity to join as an additional plaintiff. The opinion makes no mention that it was the first court ever to refuse joinder or intervention under these circumstances in a reported decision. Slip Op 20-23, 33 F.3d at 857-58.

5. The Affirmance of the Denial of Plaintiff's Right of Cross Examination of Officers Boggs and Noble Prior Inconsistent Statements in Their Police Reports and Misapplication of Waiver

The district judge had held as a matter of law that the inconsistencies between the police officers' reports and other witness testimony were not falsehoods, directing plaintiff to refrain from cross examination of the defendants on those police reports that suggesting they were false. 93-3. The court of appeals held this ruling on credibility was not error. It also misstated the record, holding that plaintiff had waived the issue. Slip Op. 13; 33 F.3d at 856. Plaintiff's main brief designated it as error. Part V C pp. 43-44. He developed it more fully in his reply when defendants took issue with what plaintiff thought was a fundamental proposition. Part IV C, 22-23.

Judge Cudahy concurred on the merits, but would not join the waiver holding, which rendered the court's discussion of the evidentiary points dicta. He noted that "[p]laintiff provided brief but fully comprehensible treatment of the issues in their briefs, and squarely presented to the court those claims." Slip Op 25; 33 F.3d at 859.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICT IN THE LOWER COURTS OVER APPLICATION OF *CITY OF LOS ANGELES v. HELLER* IN SECTION 1983 CASES TO AN ENTIRELY DIFFERENT SET OF LAW AND FACTS THAN RULED ON IN *HELLER* SHOULD BE RESOLVED

A. The Decision Below, Which Exemplifies the General Position of the Courts of Appeal and District Courts, Conflicts with Contrary Decisions of the Third, Eighth, and Tenth Circuits

City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571 (1986) was a Section 1983 excessive force action tried well before this Court's decision in *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985). *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985) [argued January 7, 1985] *rev'd, City of Los Angeles v. Heller, supra.* A brief history discussion is important because *Heller* was decided on an entirely different basis than the case below or any of the cases to which it is being presently applied. *Tuttle* was the first time this Court undertook to define the circumstances under which a municipality may be held liable under *Monell* for the injuries suffered by a plaintiff at the hands of a particular officer. The *Tuttle* plurality held that "proof of a single incident is insufficient to impose liability under *Monell*" unless the single incident involves a municipal policy that itself was unconstitutional. 471 U.S. at 824.

This Court again addressed the municipal liability for police misconduct in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986) holding that Hamilton County, Ohio could be liable under *Monell* for its County Attorney's authorization of an unconstitutional search of plaintiff's office. *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989) resolved the question of municipal Section 1983 liability for inaction once and for all. If the municipality is deliberately indifferent to the risk of constitutional deprivations by individual

officers in training [or discipline], then there is Section 1983 liability. The number of incidents and the existence of an unconstitutional policy, which *Tuttle* found determinative, are not a part of the determinative standard of municipal Section 1983 liability. 483 U.S. at 388.

The point of this history is that *City of Los Angeles v. Heller* was not tried on the theory of municipal liability for deliberate indifference to the risk of constitutional deprivations by individual officers asserted here. *Monell* was recent history when *Heller* was tried. The plaintiff in that case sued the City on a respondeat superior theory, perhaps hoping that Justice Stevens' dissent in *Tuttle* espousing respondeat superior liability would prevail. *Tuttle*, 471 U.S. at 834 (Stevens dissenting). *Tuttle*, *Pembaur*, *City of Canton v. Harris*, and indeed, *Heller* itself have removed the viability of any argument for Section 1983 respondeat superior liability.

Yet many in the lower courts - like the Seventh Circuit below - interpret *Heller* as if it decided the precise issue raised by plaintiff below. Is an informal municipal policy of deliberate indifference to excessive force relevant to the determination of whether an individual officer in fact used excessive force? Plaintiff's research has revealed 134 cases mentioning *Heller*. The citation list is included in the Appendix. The decision below exemplifies the majority of those cases' interpretation of *Heller*.

The three cases mentioned below are the present exception. Those courts have refused to rotely apply *Heller*, Instead, they have examined the issue in detail and reached the conclusion that *Heller*'s interpretation of the jury verdict in the case tried at that time was limited to the unique facts of *Heller*, which was decided at the outset of this Court's development of principles to govern Section 1983 liability for municipal inaction. Trial of a case under the standard of *City of Canton v. Harris*, *supra* requires an entirely different result than that of *Heller*.

The principal problem with the panel's interpretation of *Heller* and many of the other lower courts is that Congress in passing Section 1983 as presently interpreted by this Court intended that municipalities be liable for deliberate indifference to individual officer's use of excessive force. If municipalities are to be liable for deliberate indifference to an individual officer's use of excessive force, then the existence of a such a municipal policy must be relevant evidence that the officer *in*

fact used excessive force. Otherwise, *Monell* liability for municipal inaction to individual officers' use of force is pointless.

The Third Circuit reached a similar conclusion in *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994) (en banc). The court did not premise its decision on a matter of deference to a legislative determination. Rather, it noted the illogical result that occurs when *Heller* is applied in the manner the Seventh Circuit did here. A verdict in favor of the improperly trained, in this case disciplined, individual officer absolves municipal policymakers. The municipal policymakers who have infinitely greater resources and have knowingly disregarded the risk of injury should not be allowed to avoid liability for the very situation they themselves created. *Id* at 1292.

The Eighth Circuit reached the same result in *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992), albeit with less elaboration. The plaintiff alleged a false arrest and rape against the individual officer, Luckie, obtaining a verdict on that claim. She also obtained a verdict for supervisory liability against the Chief Bruce and *Monell* liability against the City for a policy of deliberately failing to take remedial measures against the sexual misconduct of individual officers. The Chief and City argued that the jury's failure to find Luckie liable in his individual capacity while finding both him and the Chief liable in their official capacity under *Heller* required entry of a judgment notwithstanding the verdict in favor of both defendants. *Id* at 206.

A broad reading of *Heller* such as that reached by the Seventh Circuit below would support the defendants' contention. However, the Eighth Circuit did not read *Heller* so broadly. It found that *Heller* stood for the proposition that if the jury found there was no constitutional violation, then that verdict would control against the municipality. This jury did not find that there was constitutional violation. It was specifically instructed that the City could not be liable unless plaintiff was deprived of her constitutional rights and found against the City. The court concluded that the official capacity verdicts were consistent with plaintiff's claim of a policy of deliberate indifference to Luckie's misconduct. *Id* at 207.

Moss v. City of Colorado Springs, 871 F.2d 112, 113-14 (10th Cir. 1989) also took a temperate view of *Heller*. *Moss* reached the quite logical conclusion that *Heller* does not require a construction that a verdict in favor of the officer in a trial involving reversible error

controls the municipality's liability. There were inconsistent verdicts. The Section 1983 verdict absolved the officer of an unconstitutional use of force. However, he was found liable on the p. ndent state negligence claims. The Court ordered a new trial.

Plaintiff's contention here is just as logical. The existence of a municipal policy of deliberate indifference to the risk of injury from an individual officer's use of excessive force that is a moving factor in causing the use of excessive force makes it more likely that an individual officer in fact used excessive force. Deference to Congressional policy in imposing Section 1983 liability on municipalities and in requiring the admission of all relevant evidence under Fed.R.Ev. 402 requires this result. So does logic.

B. The Interpretation of Heller has a Significant Effect on the Trial of Section 1983 Cases, Given the Tendency of District Courts to Separate the Trial Against the Individual Officer from the Trial of the Supervisory Claim Against the Policy Maker and the *Monell* Claim Against the Municipality

The effects of the conflict among the circuits is not limited to appellate review. It also has a significant effect on the outcome of Section 1983 excessive force actions, one of the most common types of federal constitutional litigation. Many district courts, adhering to the same interpretation of *Heller* as that reached in the opinion below, order that the excessive force claim against the individual officer must be tried and decided in plaintiff's favor *before* a jury even considers supervisory and municipal liability. *Myatt v. City of Chicago*, 816 F.Supp. 1259, 1264 n. 6 (N.D.Ill. 1992), which cites other cases following this practice, is a good example of this tendency among the district courts. Thus, even if the plaintiff before courts applying the Seventh Circuit's view of *Heller* avoids a summary judgment on *Monell* liability, he still is denied his most probative evidence that the individual officer did in fact use excessive force by a decision to order separate trials of the individual and *Monell* claims.

This happens regularly in the Second, Seventh, and Ninth Circuits. see *Myatt, supra. Fagan v. City of Vineland, supra* assures that it will not happen in the Third Circuit. *Parrish v. Luckie, supra*, and *Moss v. City of Colorado Springs, supra* are less certain than *Fagan*, but in combination with *Fagan* will probably carry the day in those circuits.

II. THE DECISION HAS NARROWED THE RIGHT OF ACCESS TO THE COURTS FREE FROM INTERFERENCE OF STATE ACTORS, A RIGHT CONSERVATIVE OF ALL OTHER RIGHTS AND THE FOUNDATION OF ORDERLY GOVERNMENT

A. The Decision Conflicts with Earlier Decisions of the Fifth and Seventh Circuits Holding that Police who Intentionally Falsify Their Reports to Shield the Key Facts of Police Wrongdoing from the Victim and the Public Deprive the Victim of his Constitutional Right of Access to the Courts, Regardless of Whether the Courthouse Door is Completely Closed to the Victim

This Court's definition of right against the action of governmental officers has been the subject of prisoner cases. In *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1495 (1977), the court held that the right of access to the courts to present claims recognized under state or federal law must be "adequate, effective, and meaningful" and free from intentional interference by state actors, *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148, 28 S.Ct. 334 (1907) emphasized the importance of the right.

> The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. cited in *Ryland v. Shapiro*, 708 F.2d at 971, *infra*.

Ryland v. Shapiro, 708 F.2d 967, 973 (5th Cir. 1983) was the first case directly involving law enforcement. The plaintiffs were the parents of a girl who had been murdered by an Assistant District Attorney. They brought a Section 1983 action alleging that a conspiracy among the District Attorney and another Assistant District Attorney to cover up the murder by delaying the Coroner's investigation and attempting to pass the death off as a suicide had deprived them of access to the courts. *Id.*

The Fifth Circuit reversed the dismissal of the complaint. It held that the right of access to the courts was a privilege and immunity of citizenship guaranteed by Article IV and the Fourteenth Amendment. *Id* at 971 citing *Chambers v. Baltimore & Ohio Railroad, supra*. It is a part of the right to petition guaranteed by the First Amendment. *Id*

citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972). It is also guaranteed by both the substantive and procedural components of the due process clauses of the Fifth and Fourteenth Amendments. *Id* at 972 citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982).

The court rejected defendants' contention that the right had been unaffected by the ten month delay caused by the cover up. It found that plaintiffs could recover actual damages on remand if they could show some prejudice to their wrongful death recovery. The perpetrator's murder conviction made that unlikely. However, they could show actual damage in the form of additional expenses incurred because the cover up made it more expensive to litigate. Even if they could show no actual damages, they would be still entitled to nominal damages for the deprivation of their constitutional right. *Id* at 975.

Bell v. City of Milwaukee, 746 F.2d 1205, 1262 (7th Cir. 1984) arose out of the police cover up of the wrongful shooting of Daniel Bell, a young black man in 1958. *Id* at 1214-15. Twenty years later the cover up was exposed when one of the participants confessed. The perpetrator was convicted of reckless homicide and perjury. The heirs of Daniel Bell's father, Dolphus Bell, brought the Section 1983 and 1985 action. *Id.* at 1223-24.

The court affirmed the plaintiffs' conspiracy verdict. *Id* at 1253-60. The defendants contended - like defendants here - that so long as the courthouse door was not completely closed by defendants' cover up, no deprivation of the right of access to the courts to present a state and federal wrongful death claim had occurred. The Seventh Circuit rejected that contention, relying upon *Bounds v. Smith*'s holding that the right of judicial access to the courts must be "adequate, effective, and meaningful." "This constitutional right is lost where, as here, the police officials shield from the public and the victim's family key facts which would form the basis of the family's claim for redress." *Id.* It rejected defendants' contention that liability was being imposed for police laxity in their investigatory duties. The court held the right is infringed only when the police intentionally conceal the key facts of police wrongdoing. *Id* at 1261-62.

Both *Ryland* and *Bell* give deference to the right of access to the courts free from the interference of state actors consistent with its

status as "the right conservative of all other rights" and "the foundation of orderly government". The panel opinion holds that it is permissible for state actors to intentionally interfere with that right and lessen their victim's ability to exercise that right, so long as the courthouse door is not completely closed to the victim. This is hardly an appropriate recognition of a right which occupies the exalted status that this court has assigned it.

B. The Decision Also Conflicts with a Recent Fifth Circuit Decision Holding that the Right of Access to the Courts is Infringed Whenever State Actors Wrongfully Interfere With a Victim in Retaliation for his Assertion of a Claim of Police Wrongdoing

The plaintiff in the recent case of *Hale v. Townley*, 19 F.3d 1068, 1070 (5th Cir. 1994) was a nightclub owner who had obtained a civil rights verdict against the defendant police department for earlier misconduct, which had been affirmed and paid. In this particular case, he alleged that the police had intentionally engaged in a series of uses of excessive force and unlawful arrests in retaliation for his civil rights verdict.

The Fifth Circuit rejected the qualified immunity defense, finding the right to be free from intentional interference or retaliation by the police for exercise of the right of access to the courts to be well established. Whenever the police act intentionally to hinder a person's right of access to the courts or retaliate against him for exercise of the right, that right has been infringed. *Id* at 1072-74.

Hale v. Townley is consistent with this court's earlier observations in *Chambers v. Baltimore & Ohio Railroad Co.*, *supra* that the right of access to the courts is the foundation of all orderly government. Any intentional act of unlawful interference by state actors with a person's ability to present legal claims cognizable under federal or state law is a deprivation of the right of access to the courts, even though the courthouse door is partially open to the victim. Application of the analysis of the Seventh Circuit below to the facts of *Hale* would result in a dismissal of the complaint. Hale had already recovered on his civil rights claim, so his right of access to the courts had not been deprived. This rationale substantially undermines this right, which is protective of all other rights, and must be overturned.

III. THE AFFIRMANCE OF THE REFUSAL TO ALLOW PLAINTIFF TO PRESENT EVIDENCE THAT THE CITY OF HAVANA SYSTEMICALLY DISREGARDED THE LIMITS ON POLICE USE OF FORCE REQUIRES AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

1. The Dismissal of the Access to the Courts Claim Because it Plead a "Legal Conclusion" and on Findings of Fact Made on the Rule 12 (b)(6) Motion Disregards Fundamental Precepts of the Federal Rules

The district court found the the second amended complaint alleged a failure to include a "legal conclusion" in the police reports, which did not state a claim for denial of the right of access to the courts. 18-5. The distinctions between "evidence", "facts", and "legal conclusions" have no place in the Federal Rules of Civil Procedure. *United States v. Employing Plasterer's Ass'n*, 347 U.S. 186, 74 S.Ct. 452 (1954). This court again rejected the proposition that stricter rules of pleading apply in any particular cases other than a fraud case under Fed.R.Civ.Proc. 9 (b), in *Leatherman v. Tarrant County Narcotics Unit*, 113 S.Ct. 1160, 1163 (1993), a civil rights case.

Moreover, the district court's dismissal of the denial of access to the courts claim is based upon improper fact findings. There are three possible versions of this event.

(1) The Version Alleged in the Second Amended Complaint

Plaintiff was lying on his back semi-conscious on the pavement posing no threat of injury or escape. Officer Boggs without justification lifted plaintiff from the pavement, threw him downward onto his face and stomach, and then jumped on his back with a large amount of force. Officers Boggs and Noble intentionally omitted any reference to the fact of this unjustified beating of plaintiff from their police reports with the knowledge of Chief Hardesty. 14-¶ 25, pp. 5-6, ¶ 44 p. 11 [copy appended].

(2) The Version Adopted by the District Court in its Order Dismissing the Denial of Access to the Courts

A struggle occurred between plaintiff and Officer Boggs without any substantial activity involved . The failure of Officers Boggs and Noble to mention the struggle in the report is a legitimate

interpretation of the inconclusive events that in fact occurred. 18-5

(3) A Third Possible Version

There was no struggle between plaintiff and Officer Boggs. Officers Boggs an Noble's police reports accurately stated the events that occurred.

The district court specifically found that there was no outrageous fabrication nor was there an allegation that the defendants concealed key facts from the public. 18-5. This it plainly can not do. A Rule 12 (b)(6) motion admits the truth of all matters pleaded and is construed in the light most favorable to the pleader. *Scheur v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974).

2. The Summary Judgment on Claims Arising Out of Officer Noble's Use of His Vehicle to Arrest Plaintiff when the Facts were Alleged in All Versions of the Complaint, Disclosed, and Fully Explored in Discovery, Because it was not Asserted in the Complaint in Violation of Seventh Circuit Precedent Works a Significant Injustice on Plaintiff

All versions of the complaint alleged that Officer Noble arrested plaintiff by pulling his squad car in front of plaintiff's path of travel on his motorcycle. 1-Cmp. ¶ 19-20, 7-A-C ¶ 19-20, 14-SAC ¶ 19-20. In *Brower v. Inyo County*, 489 U.S. 593, 109 S.Ct. 1378 (1989), this court held that the intentional use of a roadblock or vehicle to arrest a person must meet the Fourth Amendment standard for use of deadly force. The suspect must pose an immediate threat of serious physical injury. *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985).

Plaintiff could not determine if Officer Noble intentionally used his squad car to arrest plaintiff until the deposition of Jeff Cooper was completed on October 15, 1992 and the deposition of Officer Noble was taken on December 4, 1992. 65-10 [Cooper dep.]; 48-Noble dep. Once that was accomplished and a case could be made that Officer Noble had intentionally pulled his vehicle in front of plaintiff's path of travel when plaintiff, a traffic offender who plainly did not meet the *Garner* standard for use of deadly force, he disclosed the claim in discovery. 70-3. Defendants deposed plaintiff's expert, Mr. Katsaris, for 48 pages on this claim. 71-Ex. C.

Plaintiff's initial inability to determine whether an improper vehicular force claim existed is not unusual. *Carroll v. Borough of State College*, 854 F.Supp. 1184 (M.D. Pa. 1994) illustrates the fact intensive nature of the determination of a claim under *Brower v. Inyo County, supra*. Plaintiff should not have been penalized with the sanction of dismissal for adhering the admonition of Fed.R.Civ.Proc. 11 of looking and thinking before filing a particular claim.

The Seventh Circuit had held that a plaintiff need not amend his complaint to disclose claims uncovered in discovery so long as the existence of the claim was disclosed to the defendant and the claim was included in the pre-trial order. The district court completely disregarded *Ash v. Wallenmeyer, supra*, granting the defendants a summary judgment because the claim was not identified in the second amended complaint. 80. The refusal to follow *Ash* worked a substantial surprise and injustice on plaintiff.

3. The Summary Judgment on the *Monell* Claim of Deliberate Indifference to Officer Boggs' Use of Excessive Force, is a Substantial Departure From Usual and Accepted Judicial Procedure

Defendants' motion for summary judgment was premised on the rationale that a prior incident of the use of excessive force is necessary for imposition of *Monell* Section 1983 liability on a municipality. 44-2-4. The district court properly rejected this legal proposition. 79-3. However, it made impermissible findings of fact, holding that Officer Boggs' use of force against Jay Haas in the prior incident was justified. The court rejected the circumstantial evidence that the cord on the telephone prevented Haas from using it against Officer Boggs, negating his stated reason for using the force. The court refused to consider Chief Hardesty's admission to Mr. Haas that Officer Boggs' use of force was unjustified because plaintiff did not file a formal complaint. 79-6.

The court rejected the evidence of the four subsequent incidents of Officer Boggs' use of excessive force because they were dissimilar to the incident involving plaintiff. 79-4. The patent error of that analysis was that it was the City of Havana's repeated failure to investigate Officer Boggs' use of force and consider possible discipline in six incidents. The facts of the incidents themselves and the opinion testimony of plaintiff's expert, Mr. Katsaris, that the accepted standard

of care of police practices required investigation of each incident each raised genuine issues of material fact on the *Monell* claim.

The district court then relied upon a passage from the plurality opinion of *Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 105 S.Ct. 2427 (1985) that "proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*" and entered summary judgment. 79-5. That rationale is in direct violation of the mandate of *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989).

4. The Refusal to Allow Plaintiff to Cross Examine Defendants to Suggest that Inconsistencies in Their Police Reports Were False Denied Plaintiff a Fair Trial

Fed.R.Ev. 607 recognizes the truism that the credibility of a witness may be attacked by any party. Indeed, the right of cross examination to attack the credibility of a witness is a fundamental attribute of a fair trial. see *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974). We need not address the relationship between the Sixth Amendment right of confrontation and the due process clause's requirement of fairness of procedure to conclude that judges have no authority to rule inconsistent versions of events credible as a matter of law.

IV. THE MISSTATEMENTS OF THE RECORD AND HOLDINGS BY THE COURT OF APPEALS WERE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO FAR THAT IT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

1. The Affirmance of the Summary Judgment Entered on the Vehicular Force Claim Based Upon the Discretion to Deny a Motion for Leave to Amend, which was not filed, in Reliance on Controlling Circuit Precedent, can not stand

A party's case must be decided on the actual record. The court stated that plaintiff moved for leave to amend his complaint a third time to specifically assert a claim for use of a vehicle to arrest plaintiff. Slip Op. 5; 33 F.3d at 850. The court held that it was within the district court's discretion to deny plaintiff leave to amend his complaint. Slip Op. III B 10; 33 F.3d at 853-54.

Plaintiff never moved for leave to amend his second amended complaint. He relied upon the controlling Seventh Circuit precedent of *Ash v. Wallenmeyer*, 879 F.2d 272, 274 (7th Cir. 1989), which holds that it was not necessary for a plaintiff to amend his complaint to assert additional claims arising out of the occurrence referred to in the complaint. This glaring defect in the process given petitioners should be rectified by this Court. Trial practitioners must be able to rely upon controlling circuit procedural precedent unchallenged by their adversary.

2. The Holding that Officers Who Intentionally Falsify Their Police Reports to Cover Up Police Wrongdoing Deprive the Survivors of a Survivor of a Victim of a Police Homicide of Their Right of Access to the Courts, But Do not Deprive a Living Victim of a Police Battery of his Right of Access to the Court Undermines this Exalted Right

The affirmance of the dismissal of plaintiff's right of access to the courts claim that can not be sustained in logic or precedent. Like the affirmance of the vehicular arrest claim, it is based upon a serious misstatement of the record in this case and in the controlling Seventh Circuit precedent of *Bell v. City of Milwaukee*, 746 F.2d 1205, 1262 (7th Cir. 1984).

Plaintiff's second amended complaint stated a claim for denial of his right of access to the courts. But the court of appeals would not reverse the dismissal. It attempted to distinguish this case from *Bell* on the basis that plaintiff here lived and brought this action. In so ruling, it seriously misstated the facts of *Bell*. Dolphus Bell, the father of the victim of the 1958 police homicide, Daniel Bell, had filed a state wrongful death claim. The City tendered a nominal settlement, which he rejected and the case was ultimately dismissed. 746 at 1222-23.

The decision wrongly concluded that there was no infringement of plaintiff's access to the courts because he was present at the scene and brought the action. However, the access to the courts claim was dismissed on the pleadings. Plaintiff's allegation that he was semi-conscious must be accepted as true because the jury never considered that issue in the excessive force trial against Officer Boggs.

The court also refused to accept the truth of plaintiff's allegation that the officers intentionally falsified their reports to omit reference

to the facts of Officer Boggs' use of excessive force. It held there was no deprivation of plaintiff's right of access to the courts because he received a trial. However, Dolphus Bell received a trial in *Bell*. *Id.* Accepting plaintiff's allegations as true, the trial that plaintiff should have received was a trial on damages only due to the officer's admission of Officer Boggs' use of excessive force.

3. The Refusal to Decide Plaintiff's Contention that the Erroneous Grant of Summary Judgment on the Monell Claim of Deliberate Indifference to Excessive Force Prejudiced him in the Trial Against Officer Boggs by Denying him Relevant Evidence can not be Justified

The decision mentions the fact that its interpretation of *City of Los Angeles v. Heller, supra* conflicts with that of the Third Circuit in *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994) (en banc). Slip Op 24 n. 11; 33 F.3d at 859, n. 11. However, *Heller* did not prevent the court from deciding plaintiff's contention that the erroneous grant of summary judgment on the *Monell* claim of deliberate indifference to excessive force denied plaintiff relevant evidence that the individual officer in fact used excessive force.

4. The Finding that Plaintiff's Act of Fleeing and Eluding Caused his Injuries has no Basis in the Record or in Law

The Fourth Amendment's protects the bodily integrity of those guilty of criminal wrongdoing. As another panel of the Seventh Circuit put it, even a murderer is entitled to be free from police torture and a fair trial on his claim of police torture. *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993).

The court had no basis in the record for factually finding that plaintiff's act of fleeing and eluding caused his injury. Slip Op 15; 33 F.3d at 855. The jury's finding on that issue is voided by the district court's refusal to allow admission of the evidence that Officer Boggs' original pursuit of plaintiff, a traffic offender, violated his own Department's Rules. It was well settled when Justice Holmes observed that what is usually done is evidence of what ought to be done. *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 23 S.Ct. 622, 623 (1903).

Moreover, *Brower v. Inyo County*, 489 U.S. 593, 109 S.Ct. 1378 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985)

made it clear that the victim's conduct justifies the police in using only that degree of force that is reasonable in light of the threat presented by the person. The plaintiff in *Brower* was the survivor of a fleeing car thief; the plaintiff in *Garner* was a fleeing felon. Plaintiff, a traffic offender, is entitled to the same protection of his Fourth Amendment right to bodily integrity.

5. The Holding that Plaintiff Waived the Fundamental Error of the Denial of Plaintiff's Right to Cross Examine the Officers on Inconsistencies in the Police Reports by not Citing a Case Was a Substantial Departure from Circuit Precedent That Unfairly Surprised Plaintiff

The opinion does not accurately describe plaintiff's appellate procedure. Slip Op. 17, 33 F.3d at 856. He raised the issue of the denial of Plaintiff's right to cross-examine the officers on their reports based upon a finding that the inconsistencies were not false, which needs no citation, in his main brief. Plf's Br. V C. When defendants argued that the district court had the discretion to infringe on these fundamental rights of plaintiff, he supported the proposition with citations. The only recent citation for the proposition that plaintiff could find was the state case of *Lubbers v. Western Ry. Co.*, 118 Ill.App.3d 705, 454 N.E.2d 1186 (4th Dist. 1983) citing McCormick, *Evidence*, § 273 at p. 660. Plaintiff had to go back to *Wilson v. United States*, 162 U.S. 613, 16 S.Ct. 895 (1896) for applicable federal authority on this basic point. Reply, Part IV C, 22.

Judge Cudahy concurred, refusing to accept the majority's holding that failure to support a proposition with a case citation waives the point. Slip Op. 25; 33 F.2d at 859. The majority's application of waiver is another substantial departure from Seventh Circuit procedural precedent that surprised Plaintiff. The litigant in an appeal must "... press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority ..." *Pelfrensne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990). "An appellant is not required to anticipate and rebut in his opening brief every possible ground for affirmance that the defendant might (or might not) raise." *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 359 (7th Cir. 1987). It is enough that the "[issues are raised and] ... pressed in a professionally responsible manner." *Pearce v.*

Sullivan, 871 F.2d 61, 64 (7th Cir. 1989). Plaintiff did this. He need not cite Blackstone to support his fundamental right of cross-examination.

6. This is the First Reported Case to Deny Joinder or Intervention Under these Circumstances

Plaintiff's research revealed no prior reported case that has ever denied joinder of plaintiffs in a civil rights case alleging separate injury by the same policy. 7 Wright, Miller, & Kane, Federal Practice and Procedure, § 1656, p. 398, n. 23 & 26 (1994 Supp. n. 25, p. 39). The courts below suggested that permissive intervention under Fed.R.Civ.Proc. 24 (b) may be the appropriate remedy. The result is the same. The authorities for permissive intervention are more numerous and stronger than that on joinder. 7C Wright, Miller, & Kane, Federal Practice and Procedure, § 1911, n. 18, p. 364-66; n. 20, 366-67; (1994 Supp., § 1911, n. 18, p. 33). While the district court has wide discretion in making such decisions, it can not be allowed to ignore unanimous authority and the plain language of the Federal Rules. This is especially true since the refusal to allow Bailey's joinder was consistent with the pattern of denying plaintiff his right to present evidence of his very serious claim of systemic and repeated disregard of the police use of force in this small Illinois city.

CONCLUSION

The questions presented go to the heart of the manner in which Section 1983 excessive force cases are tried and appealed. The issues are well defined by the courts of appeals and preserved by petitioners. They are ripe for this Court's resolution.

Respectfully submitted,

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APPENDIX

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U.S. DISTRICT COURT
USDC for the Central District of Illinois (Springfield)

CIVIL DOCKET FOR CASE #: 91-CV-3196

Filed: 07/19/91

Jury demand: Defendant
Nature of Suit: 440
Jurisdiction: Federal Question
Thompson v. Boggs, et al.
Assigned to: Judge Richard Mills
Referred to: Mag. Charles H. Evans
Demand: $125,000
Lead Docket: None
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

ROBERT THOMPSON
Plaintiff

Richard L. Steagall
[COR LD NTC]
NICOARA & STEAGALL
First National Bank Bldg.
416 Main St.
815
Peoria, IL 61602
(309) 674-6085

v.

ROD BOGGS, a police officer of City of Havana
defendant

William A. Allison
[COR LD NTC]
ALLISON & KELLY
202 N. Prospect
Ste. 204
Bloomington, IL 61704
(309) 662-5084

KEVIN W. NOBLE, a police officer of City of Havana
defendant
[term 07/16/93]

William A. Allison
[term 07/16/93]
(See above)
[COR LD NTC]

TOM HARDESTY, then-Chief of police of City of Havana
defendant
[term 10/25/91]

William A. Allison
[term 10/25/91]
(See above)
[COR LD NTC]

HAVANA, CITY OF, Illinois
defendant
[term 10/25/91]

William A. Allison
[term 10/25/91]
(See above)
[COR LD NTC]

Docket as of September 3, 1993 8:11 am

7/19/91 1 COMPLAINT (summons(es) issued) returned to attorney along with CIDL-33 and consent to US-

Mag forms for service and case referred to Magistrate Judge Charles H. Evans (bn) [Entry date 07/23/91]

7/25/91 2 CERTIFICATE OF INTEREST pursuant to CDIL-33 filed by plaintiff Robert Thompson (br) [Entry date 07/29/91]

8/27/91 3 MOTION by defendants to strike, and to dismiss (bn) [Edit date 09/06/91]

8/27/91 4 MEMORANDUM IN SUPPORT of motion to strike [3-1], of motion to dismiss [3-2] by defendants (bn)

* * *

9/24/91 7 AMENDED COMPLAINT by plaintiff Robert Thompson; jury demand [1-1] (bn)

9/30/91 8 MOTION by defendant to dismiss amended complaint (ct)

10/10/91 9 RESPONSE by Robert Thompson to motion to dismiss amended complaint [8-1] (ct)

10/24/91 10 ORDER by Judge Richard Mills finding the motion to dismiss [3-2] ALLOWED as moot. (cc: all counsel) (ct)

10/25/91 11 ORDER by Judge Richard Mills granting motion to dismiss amended complaint [8-1] terminating party Havana, City of, party Tom Hardesty (cc: all counsel) (bw)

1/29/92 12 ANSWER by Rod Boggs, Kevin W. Noble, (ct)

* * *

4/6/92 14 SECOND AMENDED COMPLAINT by Robert Thompson; jury demand [1-1] (ct)

4/17/92	15	MOTION by Rod Boggs, Kevin W. Noble to dismiss amended complaint (bn)
4/17/92	16	MEMORANDUM IN SUPPORT of motion to dismiss amended complaint [15-1] by defendant Rod Boggs, defendant Kevin W. Noble (bn)
4/23/92	17	RESPONSE by plaintiff Robert Thompson to motion to dismiss second amended complaint [15-1] (bn)
5/6/92	18	ORDER by Judge Richard Mills denying motion to dismiss amended complaint as to the 1983 claim against Defendants Hardesty and City of Havana and ALLOWED WITHOUT LEAVE TO AMEND as to Plaintiff's denial of access to the courts claim [15-1] (cc: all counsel) (bn)
5/18/92	19	MOTION by Robert Thompson to alter or amend May 7, 1992 order (ct) [Entry date 05/19/92]
5/18/92	20	MEMORANDUM IN SUPPORT of motion to alter or amend May 7, 1992 order [19-1] by Robert Thompson (ct) [Entry date 05/19/92]

* * *

6/30/92	21	SCHEDULING ORDER; (cc: all counsel) (bn)

* * *

8/27/92	24	MOTION of Brad Bailey to join pending action as additional party plaintiff (br) [Entry date 08/28/92]
8/27/92	25	MEMORANDUM IN SUPPORT of motion to join pending action as additional party plaintiff [24-1] filed by Brad Bailey (br) [Entry date 08/28/92]

9/28/92	23	ANSWER by defendant (ct)

* * *

9/11/92	27	RESPONSE by Rod Boggs, Kevin W. Noble, Tom Hardesty, Havana, City of to motion to join pending action as additional party plaintiff [24-1] (bn) [Entry date 09/14/92]

* * *

9/23/92	28	OBJECTIONS To Magistrate's Recommendation That Motion For Joinder Be Denied. by plaintiff (bw)

* * *

10/2/92	29	ORDER by Judge Richard Mills denying motion to join pending action as additional party plaintiff [24-1]. The Magistrate Judge's ruling denying the motion for joinder is affirmed (cc: all counsel) (br)

* * *

1/4/93	36	SCHEDULING ORDER (cc: all counsel) (bw)

* * *

4/7/93	43	MOTION by Tom Hardesty, Havana, City of for summary judgment (ct)
4/7/93	44	MEMORANDUM IN SUPPORT of motion for summary judgment [43-1] by Havana, City of, Tom Hardesty (ct)

* * *

4/12/93	46	MOTION by plaintiff For Partial Summary Judgment (bw)

4/12/93	47	MEMORANDUM IN SUPPORT of Motion For Partial Summary Judgment [46-1] by plaintiff (bw)
4/12/93	48	EXHIBITS by plaintiff To Motion For Partial Summary Judgment [46-1] (bw)

* * *

4/20/93	50	STIPULATION (ct) [Entry Date 04/21/93]
4/20/93	51	AFFIDAVIT of Richard L. Steagall (ct) [Entry date 04/21/93]
4/20/93	52	MOTION by Robert Thompson to amend exhibits to his motion for partial summary judgment and request for judicial notice (ct) [Entry date 04/21/93]

* * *

5/3/93	54	RESPONSE by Robert Thompson to motion for summary judgment [43-1] (bn) [Entry date 05/05/93]
5/3/93	55	STATEMENT OF GENUINE ISSUES OF MATERIAL FACT by plaintiff Robert Thompson (bn) [Entry date 05/05/93]
5/3/93	56	AFFIDAVIT OF W. Ken Katsaris (bn) [Entry date 05/05/93]
5/3/93	57	AFFIDAVIT OF Bill Behymer (bn) [Entry date 05/05/93]
5/3/93	58	AFFIDAVIT OF Danny L. Flaherty (bn) [Entry date 05/05/93]
5/3/93	59	AFFIDAVIT OF Harvey Riggins (bn) [Entry date 05/05/93]

5/3/93	60	AFFIDAVIT OF Cynthia J. Reed (bn) [Entry date 05/05/93]
5/3/93	61	AFFIDAVIT OF Jason Michael Haas (bn) [Entry date 05/05/93]
5/3/93	62	AFFIDAVIT OF Roy Peters (bn) [Entry date 05/05/93]
5/3/93	63	RESPONSE by defendant to motion For Partial Summary Judgment [46-1] (br) [Entry date 05/06/93]
5/3/93	63	COUNTER MOTION by defendant for summary judgment (filed as part of Deft's memorandum in response to plaintiff's motion for partial summary judgment) (br) [Entry date 05/06/93]

* * *

5/10/93	65	EXHIBITS for Robert Thompson in support of response to defendants' motion for summary judgment (ct)
5/10/93	66	MOTION by Robert Thompson to strike certain material from defendants' response to plaintiff's motion for partial summary judgment (bn) [Entry date 05/11/93]

* * *

5/12/93	68	MOTION by Rod Boggs, Kevin W. Noble to strike affidavits submitted by plaintiff in opposition to defendants' motion for summary judgment (ct)

* * *

5/20/93	70	REPLY by plaintiff to Response To Plaintiff's Motion For Partial Summary Judgment [63-1] (bw)

5/20/93	71	EXHIBITS To Plaintiff's Reply To Defendants' Response To Plaintiff's Motion For Partial Summary Judgment [70-1] (bw)
5/20/93	72	RESPONSE by Robert Thompson to motion to strike certain material from defendants' response to plaintiff's motion [Entry date 05/21/93]
5/21/93	73	MOTION by plaintiff To Alter Or Amend May 17, 1993 Order (bw)
5/21/93	74	MEMORANDUM IN SUPPORT of Motion To Alter Or Amend May 17, 1993 Order [73-1] by plaintiff (bw)
5/21/93	75	MOTION by defendants For Oral Argument On Summary Judgment Motions (bw)
5/21/93	76	MOTION by defendants For Leave To File Reply To Plaintiff's Answer To Defendants' Motion For Summary Judgment (bw)
5/24/93	77	RESPONSE by Robert Thompson to motion For Leave To File Reply To Plaintiff's Answer To Defendants' Motion For Summary Judgment [76-1] (ct)
5/27/93	78	REPLY in Support of Their Motion for Summary Judgment by defendants City of Havana and Tom Hardesty [43-1] (br)

* * *

6/22/93	79	ORDER by Judge Richard Mill; Defendants' motion for summary judgment [43-1] is ALLOWED. Terminating party Havana, City of party Tom Hardesty. Defendants' motion to strike [68-1] is ALLOWED IN PART. The portion of Mr. Katsaris affidavit relating to the

post-event occurrences is STRICKEN. The City of Havana and Chief Hardesty are DISMISSED WITH PREJUDICE. (cc: all counsel) (bw)

6/22/93 80 ORDER by Judge Richard Mills; Plft's motion for partial summary judgment [46-1] is DENIED. Pltf. will not be allowed to amend his pleadings at this late date to include a claim for unreasonable seizure against Deft. Noble. Pltf's motion to strike [66-1] is DENIED. Defts' motion for summary judgment [63-1] is DENIED as moot. (cc: all counsel) (bw)

* * *

6/25/93 82 MOTION by plaintiff To Alter or Amend June 22, 1993 Order (bw) [Entry date 06/28/93]

6/29/93 83 PRE-TRIAL ORDER entered by Judge Richard Mills: PTC held 9:00 6/28/93: This trial is a bifurcated jury trial. (ct)

7/7/93 84 MOTION by Rod Boggs, Kevin W. Noble to add witnesses to pre-trial order (bn) [Entry date 07/08/93]

7/7/93 85 MOTION by Robert Thompson to alter or amend June 29, 1993 order (bn) [Entry date 07/08/93]

* * *

7/9/93 87 AMENDMENT TO PRE-TRIAL ORDER entered by Judge Richard Mills. (bw)

7/9/03 91 MOTION by defendant Rod Boggs, defendant Kevin W. Noble in limine (pr) [Entry date 07/13/93]

7/9/93 92 MEMORANDUM IN SUPPORT of motion in limine [91-1] by defendant Rod Boggs, defendant Kevin W. Noble (pr) [Entry date 07/13/93[

* * *

7/12/93 88 ORDER by Judge Richard Mills denying Motion To Alter Or Amend June 22, 1993 Order [82-1]. (cc: all counsel) (gu)

7/12/93 89 ORDER by Judge Richard Mills granting motion to alter or amend June 29, 1993 order [85-1]. This trial will not be bifurcated. (cc: all counsel) (gu)

* * *

7/12/93 90 MOTION by plaintiff Robert Thompson in limine to avoid comment on certain matters (gu) [Entry date 07/13/93]

* * *

7/12/93 95 MOTION by plaintiff to amend list of witnesses to include two witnesses omitted by oversight (br) [Entry date 07/14/93]

7/13/93 93 ORDER by Judge Richard Mills granting motion in limine [91-1] as to paragraphs 1, 2, 3, 4, 6 and 7, and denying for paragraphs 5 and 8. (cc: all counsel) (pr)

7/13/93 94 TRIAL BRIEF submitted by plaintiff Robert Thompson (gu)

* * *

7/13/93 100 RESPONSE by plaintiff Robert Thompson to Defendants' Motion in Limine (#91) (gu) [Entry date 07/16/93]

* * *

7/15/93	96	TRANSCRIPT, Excerpts of Proceedings, Jury Trial, 7/13/93 (gu) [Entry date 07/16/93]
7/16/93	97	RESPONSE by plaintiff Robert Thompson to Defendants' Motion to Amend Pre-Trial Order (gu)
7/16/93	98	MOTION by defendants Rod Boggs, Kevin W. Noble for directed verdict (gu)
7/16/93	99	ORDER by Judge Richard Mills. Motion for directed verdict [98-1] is Allowed as to Deft Noble and Denied as to Deft Boggs. The claim against party Kevin W. Noble is dismissed. (cc: all counsel) (gu)

* * *

7/19/93	102	TRANSCRIPT of Jury Trial of July 13, 1993 (br) [Entry date 07/20/93]
7/20/93	101	OBJECTIONS by plaintiff Robert Thompson to Defendant Instruction 4B (gu)

* * *

7/20/93	103	VERDICT for defendant Rod Boggs against plaintiff Robert Thompson (gu) [Entry date 07/21/93]
7/20/93	104	JURY INSTRUCTIONS (Given, Refused & Withdrawn) (gu) [Entry date 07/21/93]
7/20/93	105	JURY INSTRUCTIONS (Given to Jury) (gu) [Entry date 07/21/93]
7/20/93	106	EXHIBIT & WITNESS LIST (gu) [Entry date 07/21/93]

7/20/93	107	ANSWER OF THE COURT TO JURY QUESTION (gu) [Entry date 07/21/93]
7/21/93	108	JUDGMENT in a civil case entered, terminating the case (cc: all counsel) (gu)
7/23/93	109	MOTION by Brad Bailey for reconsideration (ct)
7/23/93	110	MOTION by Robert Thompson for new trial, and to alter judgment, or to amend judgment (ct) [Edit date 08/17/93]

* * *

7/27/93	111	ORDER by Judge Richard Mills denying motion for new trial [110-1], denying motion to alter judgment [110-2], denying motion to amend judgment [110-3] (cc: all counsel) (ct)
8/4/93	112	NOTICE OF APPEAL by plaintiff Robert Thompson from Dist. Court decision [111-1] (pr)

* * *

8/4/93	115	NOTICE OF APPEAL by Movant Brad Bailey from Dist. Court decision [29-1] (pr)

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, KEVIN W. NOBLE, a Police Officer of the City of Havana, in His Individual Capacity, TOM HARDESTY, then-Chief of Police of the City of Havana, in His Individual and Official Capacity, and the CITY OF HAVANA, ILLINOIS, a Political Subdivision of the State of Illinois,
Defendants.

SECOND AMENDED COMPLAINT

[Filed: April 3, 1992]

Now comes the plaintiff, ROBERT THOMPSON, by RICHARD L. STEAGALL, his attorney, and complaining of defendants, ROD BOGGS, a police officer of the City of Havana in his individual capacity ("Officer Boggs"), KEVIN W. NOBLE, a police officer of the City of Havana in his individual capacity ("Officer Noble"), TOM HARDESTY, then-Chief of Police of the City of Havana in his individual and official capacities ("Chief Hardesty") and the CITY OF HAVANA, ILLINOIS, a political subdivision of the State of Illinois ("City of Havana"), for a claim for relief states as follows:

I. JURISDICTION & VENUE

1. Jurisdiction is founded under the provisions of 28 U.S.C. § 1331, 1343(a)(4). Venue is founded under the provisions of 28 U.S.C. §1391(b).

2. Plaintiff brings this action under 42 U.S.C. § 1983 for deprivation of his Fourth Amendment right to be free from unreasonable searches and seizures and his First Amendment right of access to the courts against defendant, ROD BOGGS, a police officer of the City of Havana, Illinois, in his individual capacity for said deprivations occurring while he was acting under color of state law in the scope of his employment for the City of Havana, Illinois, as is more specifically alleged below.

3. Plaintiff asserts a claim under 42 U.S.C. § 1983 for deprivation of his Fourth Amendment right to be free from unreasonable searches and seizures and his First Amendment right of access to the courts against defendant, KEVIN W. NOBLE, a police officer of the City of Havana, Illinois, in his individual capacity, for said deprivation occurring while he was acting under color of state law in the scope of his employment for the City of Havana, Illinois as is more specifically alleged below.

4. Plaintiff asserts a claim for deprivation of his Fourth Amendment right to be free from unreasonable searches and seizures and his First Amendment right of access to the courts against defendant, TOM HARDESTY, in both his individual and official capacities, who was then-Chief of Police of the City of Havana, Illinois, as is more specifically alleged below.

5. Plaintiff asserts a claim under 42 U.S.C. § 1983 for the deprivation of his Fourth Amendment right to be free from unreasonable searches and seizures effected by OFFICER BOGGS against the CITY OF HAVANA for its unconstitutional custom and policy of tolerating the excessive use of force by police officers as is more specifically alleged below and for the

violation of his First Amendment right of access to the courts by each violation committed through its policy-making agent, CHIEF HARDESTY, as is more specifically alleged below.

6. The injurious occurrence hereinafter complained of occurred on or about July 29, 1989 at approximately 8:30 p.m. in the parking lot of the Mason District Hospital in the City of Havana, County of Mason, and State of Illinois.

II. THE PARTIES

7. Plaintiff is now a citizen of the State of Illinois and at the time complained of a citizen of the State of Iowa who was visiting in Havana, Illinois at the time of the occurrence complained of.

8. Defendant, OFFICER BOGGS, at the time of the occurrence complained of was a police officer of the City of Havana, Illinois acting under color of state law in the scope of his employment as a patrol officer and is sued in his individual capacity.

9. Defendant, OFFICER NOBLE, at the time of the occurrence complained of was a police officer of the City of Havana, Illinois acting under color of state law in the scope of his employment as a patrol officer and is sued in his individual capacity.

10. Defendant, CHIEF HARDESTY, at the time of the occurrence

complained of was Chief of Police of the City of Havana acting under color of state law in the scope of his employment as its policy-making agent for police activities and is sued in his individual capacity.

11. Defendant, CITY OF HAVANA, was a municipality organized and existing under the laws of the State of Illinois who is sued for its custom and policy which was a direct, moving

force in the deprivation of plaintiff's rights complained of herein as is more specifically set forth below.

III. THE OCCURRENCE COMPLAINED OF

A. Officer Boggs' Use of Excessive Force and Officer Noble's Deliberate Failure to Prevent It

12. It was dusk at the time of the occurrence complained of. Plaintiff was proceeding on his motorcycle complained of on Main Street in the City of Havana accompanied by a passenger, Angel McCallister.

13. Defendant, OFFICER BOGGS, was operating a squad car of the City of Havana in a direction behind plaintiff.

14. As the plaintiff crested a large hill that existed in Main Street in that area, he realized a car was on his bumper pulling up next to him, seeing only a blue car hood which he did not know at the time to be squad car.

15. The blue car hood right next to him was following at an extremely close distance causing plaintiff to be concerned that he would run off the road if he remained in this position.

16. Plaintiff then accelerated his vehicle going through a stop sign and turning a corner with defendant, OFFICER BOGGS, in pursuit in his vehicle.

17. Plaintiff did not realize a police car was chasing him until he turned the corner from Main onto McKinley. Nevertheless, he continued to operate his motor vehicle in an attempt to elude the police.

18. Plaintiff was near the hospital, drove through the emergency room entrance, and came around the corner into a parking lot.

19. When plaintiff came around the corner into the parking lot of the Mason District Hospital, he observed another squad car

parked crosswise in the lot blocking his path of escape. Plaintiff then put on his brake and attempted to lay the bike down on the pavement to keep from hitting the squad car.

20. Plaintiff slid on his braked motorcycle toward a gap between the two vehicles; as plaintiff's motorcycle approached the gap between the two vehicles, one of the squad cars moved into his path running over the front wheel of his motorcycle flipping it onto the squad car and throwing Angel McCallister off the cycle onto the other squad car where she continued 15 feet past the squad car and landed on the pavement.

21. Plaintiff was thrown from his motorcycle in this collision and landed on the front of the squad car on his side and back and was only semi-conscious at the time.

22. Defendant, OFFICER BOGGS, had jumped out of his car and approached plaintiff as he lay semi-conscious and prone on the pavement on his side and back. OFFICER BOGGS then lifted plaintiff from the ground, threw plaintiff down on his stomach with a large amount of force, jumped on plaintiff's back with a large amount of force, and knocked him totally unconscious.

23. OFFICER NOBLE was present, saw plaintiff laying semi-conscious on the pavement, and knew that plaintiff posed no threat of escape or injury at that time. Despite OFFICER NOBLE'S knowledge of plaintiff's semi-conscious state and his observation of OFFICER BOGGS' act of lifting plaintiff from the pavement with force, defendant, OFFICER NOBLE, intentionally failed to tell OFFICER BOGGS to stop his mishandling of plaintiff.

24. Emergency medical technicians from Mason District Hospital then appeared on the scene and took plaintiff away for medical treatment while he was under arrest.

B. The Cover Up; Officers Boggs & Noble's False Reports and the City of Havana's Failure to Act Upon Those False Reports

25. Defendants, OFFICER BOGGS and OFFICER NOBLE, did each falsely prepare a police report of the incident omitting any reference to the excessive force utilized in the arrest of plaintiff.

a. The fact that plaintiff was semi-conscious and in a prone position on the pavement at the time Officer Boggs' lifted him from the pavement;

b. The fact that plaintiff presented no threat of escape or serious physical injury at the time Officer Boggs lifted plaintiff from the pavement as alleged in ¶ 30.

c. The fact that Officer Boggs lifted plaintiff from the pavement, threw him down to the pavement on his stomach, and then jumped onto plaintiff's back with a large amount of force.

26. Defendant, CITY OF HAVANA, operated a police department through its policy-making agent, the defendant, then-Chief of Police, CHIEF HARDESTY and his successor as Chief of Police, Robert Huber, who first became Chief of Police of the City of Havana in the fall of 1989.

27. The defendant, CITY OF HAVANA, through its policy-making agent, CHIEF HARDESTY, knew of the excessive force utilized against plaintiff by defendant, OFFICER BOGGS, as alleged in ¶ 22 and OFFICER NOBLE'S failure to prevent OFFICER BOGGS' use of excessive force against plaintiff as alleged in ¶'s 22 & 23. Alternatively, the defendant, CITY OF HAVANA, through its policy-making agent, CHIEF HARDESTY, intentionally avoided taking any steps to inform himself of the facts of the arrest of plaintiff that would have given CHIEF HARDESTY knowledge of OFFICER BOGGS' use of

excessive force against plaintiff as alleged in ¶ 22 and OFFICER NOBLE'S failure to prevent OFFICER BOGGS' use of excessive force against plaintiff as alleged in ¶'s 22 & 23.

28. Notwithstanding the knowledge of the defendant, CITY OF HAVANA, through its policy-making agent, CHIEF HARDESTY, as alleged in the proceeding ¶ 27, the defendant, CITY OF HAVANA, through its policy-making agent, CHIEF HARDESTY, refused to properly investigate the facts of plaintiff's arrest, which would have revealed OFFICER BOGGS' use of excessive force against plaintiff as alleged in ¶ 22 and OFFICER NOBLE'S failure to prevent that excessive force as alleged in ¶ 23, with deliberate indifference to plaintiff's right of access to the courts to prevent a claim for the bodily injuries he suffered under the state tort law and the federal civil rights law guaranteed plaintiff by the First, Fourth, and Fourteenth Amendments to the Constitution of the United States.

C. The City of Havana's Policy of Condoning Police Officers' Use of Excessive Force and the Cover-Up of Police Officers' Use of Excessive Force.

29. The policy making agent for the City of Havana's police practices was the defendant, Chief Hardesty, and his successor as Chief of Police, Robert Huber, who became Chief of Police in the fall of 1989.

30. Defendant, Chief Hardesty, and his successor knew of the necessity of maintaining proper training and discipline of individual police officers employed by the City of Havana Department of Police so as to prevent the use of excessive force, i.e., that degree of force that is unreasonable, or unnecessary, or violent beyond that degree of force that a reasonable police officer would apply in similar circumstances, by individual City of Havana police officers in violation of the Fourth Amendment rights of persons within the City of Havana to be free from unreasonable searches and seizures.

31. Defendant, Officer Boggs, had tendency to use excessive force in making arrests as defined above, a tendency which was readily apparent to any police officer with knowledge of the accepted standard of police supervisory practices who performed supervisory functions over Officer Boggs in accordance with that standard of care.

32. Officer Boggs has exhibited his tendency to use excessive force on the following occasions in addition to the July 29, 1989 occurrence involving the plaintiff:

a. On June 7, 1990 while arresting Roy Peters, Officer Boggs did strike Peters on the head with his nightstick when Roy Peters posed no threat of serious physical injury to anyone.

b. On July 20, 1990, Officer Boggs went onto premises occupied by Dan Flaherty to inquire about a traffic violation; Officer Boggs in the course of arresting Mr. Flaherty, who was unarmed, did strike him across the body with his nightstick despite the fact that Flaherty presented no threat of serious physical injury to anyone.

c. On March 7, 1991, Officer Boggs while in the course of arresting Brad Bailey for the traffic offense of driving while intoxicated did strike Bailey about the face and body with his nightstick when Bailey presented no threat of serious physical injury to anyone.

33. In each of the foregoing incidents, Officer Boggs utilized excessive force (as defined above in ¶ 30 and in 3 Devitt, Blackmar, & Wolf F.J.P. & I. § 103.8) in making the arrest contrary to the accepted standard of police practice and the foregoing respective individuals right to be free from unreasonable searches and seizures guaranteed by Fourth Amendment to the Constitution of the United States.

34. The fact of Officer Boggs' use of excessive force in the four incidents described in ¶ 32 and the July 29, 1989 incident involving the plaintiff would have been readily apparent to any supervisory police officer that reviewed each incident applying the accepted standard of police practices; Officer Boggs' tendency to use excessive force would also have been readily apparent to any supervisory police officer reviewing Officer Boggs' job performance in accordance with the accepted standard of police practices prior to July 29, 1989.

35. Notwithstanding the knowledge of Chief Hardesty and his successor, the policy making agents of the City of Havana for police practices, of Officer Boggs' demonstrated tendency to engage in the use of excessive force in making arrests, the City of Havana continued to employ and failed to properly train and/or discipline Officer Boggs with deliberate indifference to the right of persons within the City of Havana to be free from Officer Boggs' use of excessive force guaranteed by the Fourth Amendment to the Constitution of the United States.

36. There existed a policy on the part of the City of Havana determined by its policy making agents for police practices, Chief Hardesty and his successor, Robert Huber, to condone and encourage the use of excessive force in making arrests against unpopular suspects by City of Havana police officers by improper training in the proper use of force and improper review of incidents where City of Havana police officers used force and the failure to administer discipline contrary to the accepted standard of police practice as demonstrated in the July 29, 1989 occurrence involving the plaintiff and the four incidents set forth in ¶ 32.

37. Defendant, OFFICER NOBLE, was acting in accordance with such policy of condoning and encouraging the use of excessive force by police officers of the City of Havana when he intentionally failed to prevent Officer Boggs' use of excessive force as alleged in ¶'s 22 & 23.

38. Defendants, OFFICERS BOGGS & NOBLE, were acting in accordance with and pursuant to such policy of condoning and encouraging the use of excessive force when they each intentionally prepared a false police report of the July 29, 1989 incident involving the plaintiff as alleged in ¶ 25.

39. The policy was formulated by the policy making agents of the City of Havana for police practices, Chief Hardesty and his successor, Robert Huber, with deliberate indifference to the rights of persons within the City of Havana to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the Constitution and the right of access to the courts to present claims for bodily injury under state tort law and the federal civil rights law unfettered by governmental suppression of evidence guaranteed by the First, Fourth, and Fourteenth Amendments to the Constitution of the United States.

40. The said policy was a moving factor in causing the deprivation of the plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures as alleged in ¶ 22 & 23 and the plaintiff's First, Fourth, and Fourteenth Amendment right of access to the courts unhindered by governmental suppression of evidence as alleged in ¶ 25.

IV. PLAINTIFF'S CLAIMS

41. At all times material herein, there was in force and effect in the United States of America a certain statute, namely 42 U.S.C. § 1983 which provided:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileged or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress...

42. Defendant, OFFICER BOGGS, while acting under color of state law, did violate the right of plaintiff to be free from unreasonable searches and seizures secured to him by the Fourth Amendment to the Constitution of the United States by lifting plaintiff from the pavement when he was semi-conscious and prone and then throwing plaintiff on his stomach with a large amount of force and then jumping onto plaintiff's back with a large amount of force when such force was unnecessary to place plaintiff under arrest, who then was incapable of making any significant movement and posed no threat of serious physical injury or escape to anyone.

43. Defendant, OFFICER NOBLE, while acting under color of state law, did violate the right of plaintiff to be free from unreasonable searches and seizures guaranteed him by the Fourth Amendment to the Constitution of the United States by intentionally failing to tell Officer Boggs to halt when Officer Boggs lifted plaintiff from the pavement and began to throw him to the ground despite Officer Noble's knowledge that plaintiff was in a semi-conscious state and prone on the pavement posing no threat of serious physical injury to anyone or escape.

44. Defendants, OFFICERS BOGGS & NOBLE, while acting under color of state law did violate plaintiff's right of access to the courts to present allegations of the violation of constitutional rights under the federal civil rights law and rights recognized under state tort law unhindered by governmental suppression of evidence in support of such claims guaranteed by the First and Fourteenth Amendments to the Constitution of the United States by intentionally omitting any mention of the following facts from the required police reports of the incident:

a. The fact that plaintiff was semi-conscious and in a prone position on the pavement at the time Officer Boggs' lifted him from the pavement;

b. The fact that plaintiff presented no threat of escape or serious physical injury at the time Officer Boggs lifted plaintiff from the pavement as alleged in ¶ 30.

c. The fact that Officer Boggs lifted plaintiff from the pavement, threw him down to the pavement on his stomach, and then jumped onto plaintiff's back with a large amount of force.

45. The policy of the City of Havana formulated by the defendant, CHIEF HARDESTY, and his successor of encouraging and condoning use of excessive force in making arrests by its individual police officers against unpopular suspects and to cover up the evidence of use of excessive force by individual police officers of the City of Havana through false police reports as alleged in ¶'s 29-40 was a moving factor in causing the deprivations of plaintiff [sic] Fourth Amendment right to be free from unreasonable searches and seizures and plaintiff's First, Fourth, and Fourteenth Amendment right of access to the courts free from governmental suppression of evidence complained of herein.

V. PLAINTIFF'S DAMAGES

46. As a direct and proximate result of the excessive force utilized by defendant, OFFICER BOGGS in which the conduct of the defendant, CITY OF HAVANA, acting through its policy-making agent, defendant, CHIEF HARDESTY, in failing to properly train its police offices [sic] and to investigate and discipline such uses of excessive force, was a substantial causative factor, plaintiff has suffered severe injuries to his body, namely a compression fracture of the T12-L1 lumbar vertebra; as a result thereof, plaintiff has suffered the following damages:

a. Deprivation of his liberty interest in physical security;

b. Severe and permanent injuries to his body including a wedging of the T12-L1 vertebra of his back causing

him continued pain and limitation of the use of his body;

c. Pain and suffering in the past and pain and suffering which he will continue to suffer in the future from these physical injuries;

d. Disability suffered in the past and disability which he continue [sic] to suffer in the future from the physical injuries;

e. Hospital, medical, and chiropractor expenses in the amount of $4,246.06 for treatment of the injuries and medical, hospital, and chiropractic expenses which he is reasonably likely to incur in the future in an effort to be healed and cured of the injuries complained of;

f. Lost wages and benefits of $780.00 incurred when he was incapacitated as a result of the injuries complained of herein and the wages he reasonably anticipates losing in the future while receiving medical treatment for such injuries;

g. Plaintiff has been hindered and hampered in the past and will continue to be hindered and hampered in the future from carrying on his ordinary affairs and duties of life to the same extent and in the same manner had it not been for the injuries and damages suffered;

h. Nominal damages.

47. As a direct and proximate result of the suppression of the true facts concerning the excessive force utilized by OFFICER BOGGS in arresting plaintiff committed by defendant, OFFICER BOGGS, defendant, OFFICER NOBLE, and the defendant, CITY OF HAVANA, acting through its policy-making agent, defendant, CHIEF HARDESTY, plaintiff has suffered an infringement on his right of access to the courts in that he has

been denied direct evidence of the violation of his Fourth Amendment rights in the form of truthful reports and testimony of the police officers involved to present his federal civil rights claim and state tort law claim for the use of excessive force against him which entitles him to an award of nominal damages; by reason thereof, he has incurred additional expenses and attorneys' fees in prosecuting this contested civil rights action beyond that which he would have incurred had the facts of OFFICER BOGGS' use of excessive force against plaintiff as alleged in ¶'s 22 & 23 and OFFICER NOBLE'S failure to prevent it as alleged in ¶ 23 been truthfully reported and OFFICER BOGGS' civil rights liability uncontested.

48. The conduct of the defendants, OFFICER BOGGS, OFFICER NOBLE, and CHIEF HARDESTY, is such that for the purposes of punishment and by way of example, plaintiff is entitled to an award of punitive damages against each defendant in his individual capacity to punish each defendant and to serve as a warning to others not to engage in such conduct.

49. Plaintiff has incurred in the past and will incur in the future attorneys' fees and expenses in prosecuting this action and is entitled to an award of reasonable attorneys' fees and expenses as a part of costs under the provision of 42 U.S.C. § 1988.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiff, ROBERT THOMPSON, prays for judgment against the defendants, ROD BOGGS, a police officer of the City of Havana in his individual capacity, KEVIN W. NOBLE, a police officer of the City of Havana in his individual capacity, TOM HARDESTY, then-Chief of Police of the City of Havana in his individual and official capacities, and the CITY OF HAVANA, ILLINOIS, a political subdivision of the State of Illinois for compensatory damages in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) and for punitive damages against each of defendants, ROD BOGGS, KEVIN

W. NOBLE, and TOM HARDESTY, in their individual capacities in the several amounts of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) plus costs.

PLAINTIFF DEMANDS A TRIAL BY JURY OF ALL CLAIMS ASSERTED HEREIN.

ROBERT THOMPSON, Plaintiff,

By: _____
RICHARD L. STEAGALL,
his attorney

PROOF OF SERVICE

The undersigned certifies that a true and correct copy of this document was duly served upon the individuals set forth below by enclosing a copy of the same in an envelope addressed as set forth below and by depositing the envelope with postage fully prepaid in a U.S. Post Office Mail Box in Peoria, Illinois, on this day of April, 1992:

Mr. William A. Allison
Allison & Kelly
2415 East Washington Street
Bloomington, IL 61704

RICHARD L. STEAGALL
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APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, KEVIN W. NOBLE, a Police Officer of the City of Havana, in His Individual Capacity, TOM HARDESTY, then-Chief of Police of the City of Havana, in His Individual and Official Capacity, and the CITY OF HAVANA, ILLINOIS, a Political Subdivision of the State of Illinois,
Defendants.

ORDER

[Filed: May 7, 1992]

RICHARD MILLS, District Judge:

This cause is before the Court on Defendants' motion to strike Plaintiff's § 1983 claim based on an alleged denial of access to the courts, and Defendants' City of Havana and Chief Hardesty's motion to dismiss Plaintiff's § 1983 claim based on excessive use of force.

Previously, this Court ruled in favor of Defendants on similar motions to strike and dismiss. Consequently, Plaintiff filed a second amended complaint which he now claims cures the defects which resulted in this Court's prior decision.

II. Motion to Dismiss and Strike

Although a complaint is not required to contain a detailed outline of the claim's basis, it nevertheless "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985). Dismissal is not granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

Under Fed. R. Civ. P. 12(f), a court may strike any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

III. Analysis

A. Motion to Dismiss

"Individual liability for damages under § 1983 is predicated upon personal responsibility." *Schultz v. Baumgart*, 738 F.2d 231, 238 (7th Cir. 1984). Unless the plaintiff can demonstrate that a supervisory official was directly responsible for the improper act, that official cannot be held liable. *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986). Supervisors who are merely negligent or even grossly negligent in failing to detect and prevent subordinates' misconduct are not liable under § 1983. *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988). "The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." *Jones*, at 992-93. The plaintiff must establish an affirmative link between the misconduct complained of and the official sued. *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985).

When municipal employees are sued in their official capacities, this action operates as a claim against the municipality itself. *Rascon*, at 274. Therefore, to state a claim against municipal supervisory officials, the plaintiff must show that the actions of the offending state officer were taken pursuant to[an official policy or practice. *Rascon*, at 274. A plaintiff must plead some fact or facts to support allegations of the existence of a municipal policy which caused his injury. *Strauss v. Chicago*, 760 F.2d 765, 769 (7th Cir. 1985). Generalized statements, without identifying specific instances of prior misconduct, indicate nothing. *Strauss*, at 768-69.

Plaintiff's Second Amended Complaint contains allegations that on: 1) June 7, 1990, Officer Boggs struck, Roy Peters on the head with his nightstick while arresting him although Mr. Peters posed no threat of injury to anyone; 2) July 20, 1990, Officer Boggs struck Dan Flaherty across the body while arresting him although Mr. Flaherty did not represent a threat to anyone; and 3) March 7, 1991, Officer Boggs struck Brad Bailey about the face and body with his nightstick while arresting him although Mr. Bailey posed no threat to anyone. The Court notes that Officer Boggs arrest Plaintiff on July 29, 1989, nearly one year prior to the first of these three incidents. Plaintiff asserts that allegations of subsequent incidents of police misconduct are sufficient to demonstrate that the municipality had a custom or practice of condoning police misconduct during the time of the incident in question.

A complaint which alleges that a plaintiff's civil rights were violated due to a municipal policy must contain allegations of fact which tend to support the existence of such a policy. *Strauss v. Chicago*, 760 F.2d 765 (7th Cir. 1985). At trial, post occurrence evidence is admissible in a § 1983 case to show a municipal policy, providing the evidence sufficiently relates to the central occurrence. *Sherrod v. Berry*, 827 F.2d 195, *vacated on other grounds*, 835 F.2d 1222 (7th Cir. 1987).

Although Plaintiff has not identified a policy or custom that was consciously chosen by Chief Hardesty to not investigate and discipline excessive uses of force, at this stage the Court cannot find that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Therefore, the Court must wait until the summary judgment stage to address the merit of Plaintiff's § 1983 claim.

B. Motion to Strike

The fourteenth amendment entitles an individual to a fair opportunity to present his or her claim. *Bell v. Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984). This constitutional right is lost where police shield from the public key facts which would form the basis for an individual's claim for redress. *Bell*, at 1261.

In *Bell*, police officers shot and killed a black man then planted a knife in his hands and fabricated a story explaining the circumstances surrounding the shooting. The Seventh Circuit held that such modification of evidence and fabrication resulted in the police officers depriving the defendant's family of access to the courts.

Plaintiff contends that his constitutional right of access to the courts was denied because Defendants Boggs and Noble should have included in their report that Officer Boggs lifted Plaintiff from the pavement, threw him down on his stomach and then jumped on his back with a large amount of force.

This case does not represent the same kind of outrageous fabrication that occurred in *Bell*. Plaintiff did not allege that any of the Defendants concealed key facts from the public. Rather, Plaintiff, in essence, has alleged that Defendants Boggs and Noble failed to admit to using excessive force when arresting Plaintiff because the officers did not recite the incident identical to how Plaintiff perceived it.

There is a substantial difference between allegations that the police concealed or falsified police documents and allegations that the police failed to state a legal conclusion in a police report. Plaintiff's allegations amount to the latter and are wholly insufficient to state a claim under § 1983. Therefore, this Court must strike all allegations in Plaintiff's complaint concerning his claim that he was denied access to the courts. Due to the deficiency of facts which could render any Defendant liable of denying Plaintiff access to the courts, he will not be afforded an opportunity to amend his complaint to include any allegations under this theory.

Ergo, Defendants' motion to dismiss and strike the second amended complaint (d/e 15) is DENIED as to the § 1983 claim against Defendants Hardesty and City of Havana and ALLOWED WITHOUT LEAVE TO AMEND as to Plaintiff's denial of access to the courts claim.

Enter 7 May, 1992

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, KEVIN W. NOBLE, a Police Officer of the City of Havana, in His Individual Capacity, TOM HARDESTY, then-Chief of Police of the City of Havana, in His Individual and Official Capacity, and the CITY OF HAVANA, ILLINOIS, a Political Subdivision of the State of Illinois,
Defendants.

ORDER

[Filed: October 2, 1992]

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's appeal of the Magistrate Judge's order denying Plaintiff's motion to join an additional third party plaintiff under Fed. R. Civ. P. 20 and 21.

Basically, Plaintiff wants to add another person, Brad Bailey, who alleges that Officer Boggs used excessive force against him some two years after Officer Boggs allegedly used excessive force against Plaintiff. The Court finds no justification for adding Mr. Bailey to this case under either Rule 20 or 21. Therefore, the Magistrate Judge's ruling on this matter is affirmed.

Ergo, Plaintiff's appeal (d/e 24) is DENIED. The Magistrate Judge's ruling denying the motion for joinder is AFFIRMED.

Enter: 30 Sept., 1992

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, et al.,
Defendants.

ORDER

[Filed: June 22, 1993]

RICHARD MILLS, District Judge:

This cause is before the Court on Defendants City of Havana's and Police Chief Tom Hardesty's motion for summary judgment pursuant to Fed. R. Civ. P.56. and their motion to strike affidavits submitted by Plaintiff in his response to the motion pursuant to Rule 56(e). The Court has previously detailed the facts of this case in its order of October 28, 1991; consequently, they will not be repeated.

I. Summary Judgment

Under Fed. R. Civ.P. 56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists when

"there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Unquestionably, in determining whether a genuine issue of material facts, exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987). "A scintilla of evidence in support of the nonmovant's position is insufficient to successfully oppose summary judgment; 'there must be evidence on which the jury could reasonably find for the [nonmoving party].'" *Brownell v. Figel*, 950 F.2d 1285 (7th Cir. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

II. Analysis

Plaintiff contends that genuine issues of material fact remain due to an incident prior to his arrest and several incidents afterwards which establish that the City and Police Chief have a pattern of deliberate indifference toward the excessive use of force by the City's officers.

In his response, Plaintiff includes affidavits from Mr. Jason Haas and Plaintiff's police practices expert, Mr. Ken Katsaris. Defendants submit that Mr. Haas' affidavit should be stricken because he was drunk at the time that the incident took place who which he testifies and the affidavit contains inadmissible hearsay. Defendants argue that Mr. Katsaris' affidavit should be stricken because there is no admissible evidence of prior excessive force in the affidavits submitted; consequently, there is nothing for him to base his opinion on. Alternatively, Defendants contend that the affidavit should be stricken because it determines the credibility of the actors involved.

The Court observes that the central issue common to both of Defendants' motions is whether post-event evidence can be admitted in a § 1983 case to show a municipal policy or practice of tolerating excessive force by its police force. In *Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987), the Seventh Circuit affirmed the trial court's decision to allow post-event evidence of excessive force involving other city police officers. The court relied on *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) which held that subsequent conduct by a municipal policymaker may be used to prove preexisting disposition and policy due to the difficulty that a § 1983 plaintiff is apt to encounter in attempting to prove the existence of an official policy or custom at the time of the incident in question.

In *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991), the First Circuit affirmed the trial court's decision to allow post-event evidence of excessive force. In *Foley*, the subsequent incident involved the same officer accused of using excessive force on the plaintiff. The court stated that "actions taken subsequent to an event are admissible if, and to the extent that, they provide reliable insight into the policy in force at the time of the incident." *Foley*, 948 F.2d at 14. However, the court cautioned that not all post-event evidence is admissible. Rather, only post-event evidence that is similar in pattern and near in time should be admissible.

The Court has examined the affidavits concerning the 4 post-event incidents in question and describes them below. The Court notes that it relied on the affidavits of the individuals who claim excessive force was used against them, with the exception of Brad Bailey whose affidavit was not submitted. Instead, in Mr. Bailey's case, the Court relied on the police report to explain why Mr. Bailey was stopped by the police and the affidavit of an eyewitness to describe the incident.

First, the incident involving Harvey Riggins occurred nearly one year later and was a result of Mr. Riggins accosting a police

officer. Officer Boggs was called in for back up and struck Mr. Riggins across the back of the legs with his night stick. Mr. Riggins does not report being struck more than once. The second incident involved Roy Peters and also occurred nearly one year later and consisted of Mr. Peters arguing with Officer Boggs as he tried to take him to the police station on suspicion of theft and Officer Boggs striking Mr. Peters in the head with his nightstick. Third, nearly one year later Officer Boggs is accused of striking Dan Flaherty across the chest with his nightstick and knocking him to the ground in the course of arresting him. Finally, the incident involving Brad Bailey occurred twenty months later when Officer Boggs was called in for back up after Mr. Bailey was pulled over for erratic driving, beer cans were found in his car, and no proof of insurance was found. Mr. Bailey raised his arms against the arresting officers and Officer Boggs struck Mr. Bailey with his nightstick and fist. In the case at bar, it is alleged that after Plaintiff crashed his motorcycle while attempting to elude the police, Officer Boggs threw him on his stomach onto the pavement and "jumped" on his back. The Court finds that the post-event evidence involving 4 others is not sufficiently similar in pattern or close in time to the incident involving Plaintiff to be admitted against the Defendants in order to establish a custom, policy, or practice of tolerating excessive force.

Plaintiff has also submitted evidence of an incident involving Officer Boggs prior to the episode with Plaintiff in the form of an affidavit from Mr. Jason Haas which states that Mr. Haas "got a little rowdy" in the Mason County Jail after being picked up for DUI, resulting in Officer Boggs hitting him in the left leg behind the knee. A few days after this incident, Mr. Haas reported Officer Boggs' actions to the Havana Police and talked to Chief Hardesty who invited Mr. Haas to the police station to take pictures of his leg. Mr. Haas declined the invitation because the color of the back of his leg had changed and it wasn't as swollen as it had been.

When municipal employees are sued in their official capacities, the action operates as a claim against the municipality itself. However, the municipality will only be liable if the violation of the plaintiff's rights can be traced to a custom, policy, or practice of the municipality. *Monell v. Dept. of Social Service*, 436 U.S. 658 (1978). In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the Supreme Court stated:

> some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official. . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise, the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Tuttle, 471 U.S. at 824.

Moreover, unless the plaintiff can demonstrate that a supervisory official was directly responsible for the improper act, that official cannot be held liable. *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986). Supervisors who are merely negligent or even grossly negligent in failing to detect and prevent subordinate's misconduct are not liable under § 1983. *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988).

The Court finds that the admissible evidence, when taken in the light most favorable to Plaintiff, warrants an allowance of summary judgment in favor of the Defendants. Under the test announced in *Tuttle*, Plaintiff does not have sufficient evidence from which a jury could reasonably find for him that the City had a municipal policy of inadequately training its officers to prevent the use of excessive force or inadequately investigating allegations of excessive force. In the single prior incident reported by Plaintiff, the affiant states that Chief Hardesty invited him to police station to show him the injuries inflicted by Officer Boggs. However, the *affiant* declined to pursue the investigation, not Chief Hardesty. In addition, the Court notes that the cities police officers were sent to the Police Training Institute and various other seminars. Consequently, the city is not guilty of deliberate indifference with regard to the training of its officers. *See Graham v. Sauk Prairie Police Com.*, 915 F.2d 1085 (7th Cir. 1990).

Ergo, Defendants' motion for summary judgment (d/e 43) is ALLOWED. Defendants' motion to strike (d/e 68) is ALLOWED in part. The portion of Mr. Katsaris affidavit relating to the post-event occurrences is STRICKEN. The City of Havana and Chief Hardesty are DISMISSED WITH PREJUDICE.

ENTER: 22 June, 1993

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, et al.,
Defendants.

ORDER

[Filed: June 22, 1993]

RICHARD MILLS, District Judge:

This cause is before the Court on the parties' cross-motions for partial summary judgment pursuant to Fed. R.Civ. P.56, and Plaintiff's motion to strike certain material submitted by Defendants in their response to his motion pursuant to Rule 56(e). The Court has previously detailed the facts of this case in its order of October 28, 1991; consequently they will not be repeated.

Plaintiff contends that due to the depositions of Defendant Officer Noble and Chief Hardesty taken on December 4, 1992 and December 10, 1992 respectively, and the opinion of his expert Mr. Ken Katsaris, he is entitled to summary judgment for a claim of unreasonable seizure arising from Defendant Noble's use of his squad car to block Plaintiff from successfully escaping from the police through the hospital parking lot. Defendants assert that Plaintiff's claim for unreasonable seizure is barred by the statute of limitations since it has been raised for the first time approximately three years and nine months after the initial

occurrence. In addition, Defendants argue that a question of fact remains over whether Office Nobel's acts were reasonable. Finally, Defendants maintain that the City and Chief Hardesty are not liable for Officer Noble's actions. Plaintiff counters that the portion of Defendants' response which calculates that he had sufficient time to stop without hitting the roadblock should be stricken as inadmissible hearsay.

Initially, the Court disagrees with Officer Noble's assertion that he was dismissed from the case because the only claims against him, falsifying a police report and not reporting Officer Boggs' alleged use of excessive force to his superiors, were dismissed. The complaint clearly states at ¶ 43 that Officer Noble violated Plaintiff's right to be free from unreasonable searches and seizures when he failed to prevent Officer Boggs' excessive use of force at the scene. Moreover, the Court never dismissed Officer Noble from this case. Thus, the issue is whether this claim gives Defendants' notice of Plaintiff's roadblock/seizure claim, and, if not, whether the Court will allow Plaintiff to amend the pleadings on the eve of trial.

The claims specifically alleged against Officer Noble in Plaintiff's complaint are for violations of the Plaintiff's right to be free from unreasonable searches and seizure due to Officer Noble's failure to prevent Officer Boggs' use of excessive force, and for a violation of Plaintiff's right to access to the courts. Moreover, Plaintiff's own outline of his claims contained within his second amended complaint mentions only that Officer Noble violated the Fourth Amendment for failing to prevent a fellow officer's use of excessive force and that he denied Plaintiff access to the courts. (Plaintiff's Response to Defendant's Motion to Dismiss Second Amended Complaint, at 2). The latter claim was dismissed by the Court on May 7, 1992.

The Federal Rules allow the amendment of pleadings providing the other party is not prejudiced. This case is distinguishable from *Ash v. Wallenmeyer*, 879 F.2d 272 (7th Cir. 1989), cited by

Plaintiff to support his contention that his claim for unreasonable seizure should be allowed. In *Ash*, Plaintiff moved to amend the amount of damages sought, not the underlying claim. *Ash*, 879 F.2d at 274.

In this case, after completion of discovery and on the eve of trial, Plaintiff seeks to amend the pleadings to include a brand new cause of action which he asserts was unknown to him prior to the completion of his expert's and Officer Noble's and Chief Hardesty's depositions. The Court disagrees that Plaintiff could only have learned of this claim during discovery. Rather, Plaintiff was aware that Officer Noble used his car as a roadblock from the beginning of the case. Moreover, the case of *Brower v. Country of Inyo*, 109 S. Ct. 1378 (1989), which Plaintiff states allows his claim for unreasonable seizure due to the use of a roadblock to stop him, was decided prior to the filing of this suit. Consequently, the Court finds that justice does not require that Plaintiff be allowed to amend the pleadings to reflect a claim under *Brower*.

Additionally, Court notes that under *Monell v. Dept. of Social Serv.*, 436 U.S. 658 (1978) and *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988), the City and Chief Hardesty would not be liable because there is no evidence of a custom, policy, or practice concerning improper roadblocks and no evidence that Chief Hardesty acted with deliberate, reckless indifference with respect to procedures concerning police roadblocks.

Ergo, Plaintiff's motion for partial summary judgment (d/e 46) is DENIED. Plaintiff will not be allowed to amend his pleadings at this late date to include a claim for unreasonable seizure against Defendant Noble. Plaintiff's motion to strike (d/e 66) is DENIED. Defendants' motion for summary judgment (d/e 63) is DENIED as moot.

ENTER: 22 June, 1993

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, et al.,
Defendants.

ORDER

[Filed: July 12, 1993]

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's motion to alter or amend the Court's order of June 22, 1993.

Plaintiff contends that the motion did not dispose of his claim that Chief Hardesty and the City failed to discipline the excessive uses of force by Officer Boggs both prior and after the incident involving Plaintiff. The Court disagrees that this claim was not dismissed through its order allowing Defendant's motion for summary judgment. In that order, the Court states that the post-event evidence is too far removed in time and similarity to be used against Defendants to establish liability in Plaintiff's case. (See Order of June 22, 1993, at 4). The Court found that the prior incident involving Officer Boggs was insufficient to establish a custom, policy, or practice of tolerating the use of excessive force, or failing to investigate claims of excessive use of force for the purpose of disciplining officers, because the person involved

in the prior incident refused to go forward with his complaint. (See Order of June 22, 1993, at 6).

Ergo, Plaintiff's motion to alter or amend the order of June 22, 1993 (d/e 82) is DENIED.

ENTER: 8 July, 1993

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, et al.,
Defendants.

ORDER

[Filed: July 13, 1993]

RICHARD MILLS, District Judge:

This cause is before the Court on Defendant's motion in limine.

First Defendants request that Plaintiff be prohibited from introducing evidence of prior and subsequent incidents involving Officer Boggs and Noble. The Court has already made it very clear that both the prior and post-event evidence involving Office Boggs was not admissible concerning whether the City or Chief Hardesty had a custom, policy, or practice of tolerating excessive force. However, it has not considered whether this evidence is admissible against Officers Boggs and Noble. Plaintiff asserts that this evidence is admissible as habit evidence under Fed.R.Evid. 406.

The Court finds that such evidence is not habit evidence. As stated by the Advisory Committee to Rule 406, habit describes one's regular response to a repeated specific situation. The prior

and post-event incidents in question do not establish that Officer Boggs uses excessive force as a regular response to making arrests. Therefore, the Court concludes that Rule 404 is applicable. Accordingly, such evidence is inadmissible.

Second, Defendants move that no rules, regulations, or orders of the Havana Police Department or other entity, concerning high speed pursuits be admitted. The Court finds that such evidence is irrelevant since the Court denied Plaintiff's motion to amend his complaint to include a claim against Officer Noble for use of excessive force due to Office Noble blocking the exit from the hospital parking lot.

Third, Defendants request that no evidence concerning the preparation of false police reports be admitted. The Court notes that the police reports in question are not "false" merely because they are not in agreement with reports of other witnesses. Therefore, Plaintiff may not categorize Officers Boggs and Nobles reports as "false". The Court finds that the reports are inadmissible; however, they may be used to refresh recollection.

Fourth, Defendants assert that no evidence that Chief Hardesty or anyone else did an investigation into this incident be admitted. The Court finds that this evidence is irrelevant and prejudicial to a determination of whether Officers Boggs and Noble use of force exceeded the amount of force used by a reasonable officer under similar circumstances.

Fifth, Defendants move that no expert testimony, other than that of a physician, be admitted don the issued of whether excessive force was used. The Court must deny this request. The standard for whether excessive force was used is what force a reasonable officer under similar circumstances would have used. The Court finds that expert testimony may aid the jury in deciding that question.

Sixth, Defendants request that the Court prohibit any reference to any facts and circumstances which relate to Plaintiff's claims which have been dismissed. The Court will allow this request to the extent that any of the facts and circumstances are not also directly relevant to the remaining issues.

Seventh, Defendants move that Plaintiff be barred from introducing any argument or evidence that they are liable for the actions of Officer Noble in placing his squad car in the hospital parking lot exit. The Court has dismissed this claim; accordingly, any evidence concerning the Defendants' *liability* for this act is irrelevant and inadmissible.

Finally, Defendants request that Plaintiff be prohibited from introducing a videotape of the route taken by Plaintiff and Defendants to arrive at the hospital parking lot. The Court finds that the videotape is admissible to set the scene of the incident but may not be used as evidence regarding a claim that the method of pursuit was an excessive use of force.

Ergo, Defendants' motion in limine (d/e 91) is ALLOWED for paragraphs 1, 2, 3, 4, 6, and 7 and DENIED for paragraphs 5 and 8.

ENTER: 13 July, 1993

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, et al.,
Defendants.

ORDER

[Filed: July 16, 1993]

RICHARD MILLS, District Judge:

This cause is before the Court on Defendant's motion for a directed verdict pursuant to Fed.R.Civ.P.50(a).

Rule 50(a) states that after a party has been fully heard on an issue and "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim. . . ."

In this case, the Court finds that the motion should be denied with respect to Officer Boggs. In view of the evidence, the Court concludes that there is a legally sufficient evidentiary basis for this case to proceed to the jury.

However, the Court will allow the motion with respect to Officer Noble. An officer who is present at the scene and who fails to take reasonable steps to protect a subject from another officer's excessive use of force may be liable under § 1983. *Byrd*

v. Brishke, 466 F.2d 6 (7th Cir. 1972). However, before that officer may be held liable, he or she must have a realistic opportunity to prevent the attack. *Gaudreault v. Municipality of Salem*, 923 F.2d 203 (1st Cir. 1990) *cert. denied*, 111 S. Ct. 2266 (1991); *O'Neill v. Krzemski*, 839 F.2d 9 (2d Cir. 1988). If the use of excessive force happens quickly and is over in a few seconds, the officer cannot be held liable even if he or she is in close proximity to the subject. *See Gaudreault*, 923 F.2d at 206-207 n.3.

In this case, the evidence indicates that Officer Boggs ran up to Plaintiff, tackled him, and turned him over to apply handcuffs while Officer Boggs' knee was in his back. There is no evidence of a prolonged encounter between Officer Boggs and Plaintiff. Rather, the evidence demonstrates that the whole incident happened quickly thereby denying Officer Noble a realistic opportunity to prevent Officer Boggs from tackling and cuffing Plaintiff. Furthermore, Plaintiff's expert never rendered an opinion as to whether Officer Noble violated the accepted standard of care. (See Trial Transcript of Ken Katsaris Testimony, at 16, 22, 23, 27-35, 64, and 70).

Ergo, Defendants' motion for a directed verdict is DENIED for Officer Boggs and ALLOWED for Officer Noble. The claim against Officer Noble is DISMISSED.

ENTER: 16 July, 1993

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX J

UNITED STATED DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

CASE NUMBER 91-3196

ROBERT THOMPSON

V.

ROD BOGGS
KEVIN W NOBLE
TOM HARDESTY
CITY OF HAVANA

[Filed: July 21, 1993]

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to jury verdict on July 20, 1993, judgment is entered for the Defendant, Rod Boggs, and against the Plaintiff, Robert Thompson.

Pursuant to Order entered July 16, 1993 by The Honorable Richard Mills, Defendants' Motion for Directed Verdict is Allowed as to Defendant, Kevin W. Noble. The claim against Defendant Noble is Dismissed. Pursuant to Order entered June 22, 1993 by The Honorable Richard Mills, summary judgment is entered for Defendants Tom Hardesty and City of Havana, Illinois.

July 21, 1993 /s/ John M. Wat ers
Date *Clerk*

APPROVED BY: /s/ Richard Mills /s/ Gloria Utsinger
Richard Mills, U.S. District Judge *(By) Deputy Clerk*

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, et al.,
Defendants.

ORDER

[Filed: July 27, 1993]

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's motion for a new trial or to alter or amend judgment under Fed.R.Civ.P.59(a) and (e).

The Court finds that most of Plaintiff's motion is a reargument of issues already presented in the parties' previous motions to dismiss, for summary judgment, in limine, and for a directed verdict. The Court again rejects Plaintiff's arguments for the same reasons it did when it ruled on the above mentioned motions.

The only new ground presented is Plaintiff's assertion that he is entitled to a new trial because the Court refused to give his instructions Nos. 15 and 16. These instructions concerned the liability of the defendant even though third parties may have been partially responsible for the plaintiff's injury.

There was no admissible evidence concerning any third party's responsibility for Plaintiff's injury. The Court finds that it tendered the appropriate instructions for a § 1983 suit for excessive use of force. Accordingly, Plaintiff was not denied a fair trial because the Court did not give the above mentioned instructions.

Ergo, Plaintiff's motion for a new trial or to amend the judgment (d/e 110) is DENIED.

ENTER: 26 July, 1993

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, KEVIN W. NOBLE, a Police Officer of the City of Havana, in His Individual Capacity, TOM HARDESTY, then-Chief of Police of the City of Havana, in His Individual and Official Capacity, and the CITY OF HAVANA, ILLINOIS, a Political Subdivision of the State of Illinois,
Defendants.

NOTICE OF APPEAL

[Filed: Aug. 4, 1993]

Notice is hereby given that ROBERT THOMPSON, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on July 21, 1993, the order denying plaintiff's motion for new trial and to alter or amend judgment entered on July 27, 1993, and all previous orders.

/s/ Richard L. Steagall,
RICHARD L. STEAGALL,
attorney for plaintiff

RICHARD L. STEAGALL
JOHN P. NICOARA
815 Commerce Bank Building
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APPENDIX M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 91-3196

ROBERT THOMPSON,
Plaintiff,

vs.

ROD BOGGS, A Police Officer of the City of Havana, in His Individual Capacity, KEVIN W. NOBLE, a Police Officer of the City of Havana, in His Individual Capacity, TOM HARDESTY, then-Chief of Police of the City of Havana, in His Individual and Official Capacity, and the CITY OF HAVANA, ILLINOIS, a Political Subdivision of the State of Illinois,
Defendants.

NOTICE OF APPEAL

[Filed: Aug. 4, 1993]

Notice is hereby given that BRAD BAILEY, movant in a motion to join pending action as party plaintiff filed August 27, 1992, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on July 21, 1993, the order denying movant's motion to join pending action as party plaintiff by the Magistrate Judge entered on September 14, 1992, the order affirming the Magistrate Judge's order entered by the District Judge on October 2, 1992, and the order denying movant's motion to alter or amend judgment entered on July 23, 1993.

BRAD BAILEY, Movant

/s/ Richard L. Steagall
RICHARD L. STEAGALL,
his attorney

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JOHN P. NICOARA
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Telephone: (309) 674-6085

APPENDIX N

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ORAL ARGUMENT

Date: January 10, 1994

By the court:

No. 93-2891

ROBERT THOMPSON,
Plaintiff - Appellant
v.

ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants - Appellees

No. 93-2892

ROBERT THOMPSON,
Plaintiff
and
BRAD BAILEY,
Appellant
v.

ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Springfield Division No. 91 C 3196, Richard Mills, Judge

IT IS ORDERED that this case be set down for oral argument on Monday, February 7, 1994, in the Courtroom of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn, Room 2721, Chicago, Illinois, at 10:30 a.m.

Oral argument will be no more than 30 minutes for each side. Counsel are advised that the panel of judges assigned to oral argument may decide, after reading the briefs, that less time is required for oral argument.

Copies of this notice have been sent to counsel of record.

NOTE: Pursuant to Circuit Rule 34(a), counsel who are to present argument in this matter are hereby required to notify the Clerk's Office (312-435-5850) of such fact no later than two business days prior to the scheduled date of such oral argument. This must be done by completing and returning the enclosed postcard. Divided arguments on behalf of a single party or multiple parties with the same interest are not favored by the Court. However, if more than one counsel will appear on the side, such fact must also be made clear. See Circuit Rule 34(c).

Any request for waiver or postponement of a scheduled oral argument must be made by formal motion, with proof of service on all other counsel or parties. Postponements will be granted only in extraordinary circumstances. See Circuit Rule 34(e).

The judges may decide to render an oral decision from the bench.

(1006-110493)

APPENDIX O

NICOARA & STEAGALL
Attorneys at
815 Commerce Bank Building
Peoria, Illinois 60602

JOHN P. NICOARA TELEPHONE 309-674-6085
RICHARD L. STEAGALL FACSIMILE 309-674-6032

June 21, 1994

Mr. Thomas F. Strubbe
United States Court of Appeals
for the Seventh Circuit
2710-A U.S. Courthouse
219 S. Dearborn Street
Chicago, IL 60604

Re: *Thompson & Bailey v. Boggs et al*
Seventh Circuit No. 93-2891 & 93-2892

Dear Sir:

In accordance with Seventh Circuit Rule 28 (j), plaintiff cites to the court the supplemental authority of *Fagan v. City of Vineland*, 1994 WL 157781 (3d Cir. 1994) decided on April 29, 1994, but yet to be released for publication.

The case holds that a municipality can be liable under Section 1983 for a constitutional violation when no individual police officer is liable. *Id* at 8-9 distinguishing *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571 (1986) *per curiam.*

Ten copies of the Westlaw report of the decision are being submitted with the original of this letter, as required by Circuit Rule 28 (j). A copy of this letter and of the *Fagan* decision is being provided to defense counsel.

I ask that you confirm filing by returning a file stamped copy of this letter in the stamped envelope provided.

Very truly yours,

/s/ Richard L. Steagall
RICHARD L. STEAGALL

RLS/kap
Enclosures
pc: William A. Allison, Esq.
(with one copy of enclosure)
6/21/94

APPENDIX P

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2891

ROBERT THOMPSON,
Plaintiff-Appellant,

v.

ROD BOGGS, Police Officer of the City of Havana, Illinois, KEVIN W. NOBLE, Police Officer of the City of Havana, Illinois, TOM HARDESTY, Chief of Police of the City of Havana, Illinois, et al.,
Defendants-Appellees.

No. 93-2892

ROBERT THOMPSON,
Plaintiff,

and

BRAD BAILEY,
Appellant,

v.

ROD BOGGS, Police Officer of the City of Havana, Illinois, KEVIN W. NOBLE, Police Officer of the City of Havana, Illinois, TOM HARDESTY, Chief of Police of the City of Havana, Illinois, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Central District Of Illinois, Springfield Division.
No. 91 C 3196—**Richard Mills**, *Judge*.

ARGUED FEBRUARY 7, 1994—DECIDED AUGUST 31, 1994

Before CUDAHY and COFFEY, *Circuit Judges*, and NORGLE, SR., *District Judge*.*

COFFEY, *Circuit Judge*. Robert Thompson filed this § 1983 suit alleging a number of claims against the defendants arising from his July 29, 1989 arrest by Havana, Illinois, Police Officer Rodney Boggs. Thompson was arrested following a high speed chase during which, according to Officer Boggs' Offense Report, Thompson was observed and believed to be "DUI, [driving with a] revoked [license], reckless [driving], fleeing [an officer, and] speeding." Prior to trial, the court granted summary judgment on several of the claims and during the trial, the court granted judgment as a matter of law on the claim against Officer Kevin Noble (for failing to prevent Boggs' alleged use of excessive force). Thus, only one claim, Boggs' alleged use of excessive force against Thompson, was presented to the jury which returned a verdict in favor of the defendant, Officer Boggs. We affirm.

I. *BACKGROUND*

A. *Facts*

The evidence at trial disclosed the following information. Officer Boggs testified that on July 29, 1989, he observed Thompson driving a motorcycle with a female passenger. Having prior knowledge of Thompson's driving record, Boggs

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* Judge Charles R. Norgle, Sr., of the Northern District of Illinois, sitting by designation.

suspected that Thompson was operating the motorcycle without a valid operator's license. Boggs stated that he followed Thompson in his squad car, radioed his dispatcher and received confirmation that Thompson's Illinois driver's privileges had been revoked. Upon receipt of this information Boggs activated his squad car's lights and siren in an attempt to apprehend and interview Thompson. Rather than pulling to the side of the road as required by Illinois statute, Thompson accelerated and sped away. Officer Noble, also on duty that evening, testified that he heard the dispatcher's radio report over the air of Thompson fleeing, and joined in the pursuit of Thompson. In separate police cars, with sirens and multi-colored lights activated, Officers Boggs and Noble pursued Thompson through the outskirts of the City of Havana, Illinois, and toward the Mason District Hospital. During the chase, Thompson sped through at least three stop signs and reached speeds in excess of sixty miles per hour along the city's streets. Believing that Thompson's motorcycle was heading for the hospital's parking lot, Officer Noble stated that he drove his vehicle to the rear exit of the hospital lot and positioned his vehicle sideways, blocking a portion of the exit. As he did this, Thompson, still being pursued by Boggs, rounded the corner of the hospital, nearly striking people leaving the facility. Seeing Officer Noble's squad car ahead, Thompson braked, skidded, and collided with the left front fender of Officer Noble's squad car. Thompson's passenger was catapulted over the hood of the squad car and on to the pavement while Thompson was thrown to the roadway.

Officer Boggs testified that following the collision, he immediately stopped his squad car, exited, and ran towards Thompson. According to Boggs, it appeared to him that Thompson was getting up and preparing to flee on foot (Boggs described Thompson's position as "a sprinter's starter's position"), so Boggs "tackled" Thompson by "kind of thr[owing] my body into his, and when we ended up, he was on his back and I was sort of laying on top of him." Boggs testified that he then straddled

Thompson, rolled him onto his stomach, and placed the lower part of his leg across Thompson's lower back to restrain the suspect because Thompson was struggling in an attempt to escape. Boggs claimed that after handcuffing Thompson, he yelled to spectators to get medical help. Officer Noble testified that after Boggs arrested Thompson, he (Noble) left his squad car and assisted the young woman who had been thrown from the motorcycle when it came in contact with Noble's police car. A subsequent medical examination of Thompson revealed that he had suffered a compression fracture of a vertebrae in his lower back.

At trial, Thompson testified that as he rounded the hospital and approached the rear exit of the parking lot, Officer Noble's squad car "speeded up to cut me off. And as he did so, [his squad car] hit me. I didn't hit him." Thompson asserted that his back was injured when, following the collision, Boggs lifted him off the ground, threw him back down, and jammed his knee into Thompson's back. Thompson further recounted that he drifted in and out of consciousness (he testified that after colliding with Officer Noble's squad car he "noticed" that he "was out"), that he "don't [sic] remember no [sic] pain in my back until someone come [sic] down on my back," and claimed that he did not struggle with Officer Boggs nor ever attempt to flee on foot.

B. *Procedural History*

Thompson sued Officer Rodney Boggs and fellow Officer Kevin Noble in their individual capacities, claiming that Boggs used excessive force when effecting an arrest in violation of the Fourth Amendment, and that Officer Noble intentionally failed to prevent Boggs from using the alleged excessive force. In addition, Thompson maintained that both officers denied him his first amendment right of access to the courts because the officers in their police reports failed to set forth that Officer Boggs had used excessive force during the arrest. Finally, Thompson asserted a claim against the City of Havana, Illinois, and Thomas

Hardesty, its police chief, asserting that Hardesty and the City had a custom or policy condoning Boggs' use of excessive force. Plaintiff's cause of action was based upon his allegation that "Officer Boggs has exhibited his tendency to use excessive force on [four occasions subsequent to] the July 29, 1989 occurrence involving Plaintiff[,]" as well as on one occasion prior to Thompson's arrest, and that neither Police Chief Hardesty nor the City authorities had ever investigated allegations of Boggs' use of excessive force nor disciplined him for his allegedly illegal behavior.[1]

Arguing that Thompson had failed to state claims upon which relief could be granted, Officers Boggs and Noble moved to dismiss the claim that Boggs had used excessive force, that Noble had failed to prevent Boggs' use of excessive force, and that Thompson had been denied access to the courts. The judge denied the defendants' motions to dismiss with respect to Thompson's assertion 1) that Boggs used excessive force and 2) that Noble failed to prevent the use of excessive force, finding that Thompson's claims were cognizable and sufficiently supported by factual allegations. The district court dismissed Thompson's cause of action asserting a denial of access to the courts, stating that "Plaintiff, in essence, has alleged that Defendants Boggs and Noble failed to admit to using excessive force when arresting Plaintiff because the officers did not recite the incident identical to how Plaintiff perceived it. There is a substantial difference between allegations that the police concealed or falsified documents and claims that the police failed to state a legal conclusion in a police report. Plaintiff's assertions amount to the latter and are wholly insufficient to state a claim under § 1983."

Thompson then moved the court for a grant of summary judgment on his allegation that Noble illegally used his squad car

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[1] Thompson was permitted to amend his original complaint twice.

as a roadblock. Noble responded that Thompson had not previously asserted this particular cause of action in either his original complaint, amended complaint, or second amended complaint, to which Thompson replied that he had just learned of the existence of the illegal seizure claim during discovery. Thompson moved to amend his complaint for a third time to specifically include the illegal seizure claim. The district judge denied Thompson's motion to amend his second amended complaint because Thompson, who was involved in the incident, had knowledge for almost four years that Noble used his car as a roadblock and that the case upon which plaintiff based his illegal seizure claim, *Brower v. County of Inyo,* 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989), had been decided prior to the time Thompson filed suit.

Subsequently, the City of Havana, Illinois, and Police Chief Hardesty moved for summary judgment on plaintiff's contention that there existed a municipal policy of condoning Officer Boggs' use of excessive force by failing to discipline Boggs. After examining the affidavits of the alleged victims, the court granted the defendants' motion for summary judgment, finding that the four allegations of Boggs' excessive use of force occurring after the Thompson incident (July 29,1989) were "not sufficiently similar in pattern or close in time to the incident involving Plaintiff to be admitted against the Defendants in order to establish a custom, policy, or practice of tolerating excessive force." Thus, the single incident which occurred prior to the Thompson arrest remained for the court's consideration. With respect to that prior incident, the court noted that the police chief invited the alleged victim, Jay Haas, to pursue an investigation, but that Haas declined the opportunity. Since the court limited its consideration to the single prior incident of Boggs' alleged excessive use of force, and because the purported victim of that incident refused to file a claim for the use of excessive force, the court concluded that "Plaintiff does not have sufficient evidence from which a jury could reasonably find for him that the City had

a municipal policy of . . . inadequately investigating allegations of excessive force." The final pretrial motion concerned appellant Brad Bailey, who moved to join Thompson's suit as a plaintiff. Like Thompson, Bailey asserted claims that he was a victim of Officer Boggs' use of excessive force and that by failing to discipline Officer Boggs, the police chief and the City maintained a policy or custom of condoning Boggs' use of excessive force. Bailey's joinder motion was denied without explanation.

A jury trial was conducted on plaintiff's two remaining claims—that on July 29, 1989, Boggs used excessive force when arresting Thompson and that Noble intentionally failed to prevent Boggs' alleged use of excessive force on Thompson. At the conclusion of plaintiff's case-in-chief, the trial judge granted Officer Noble's motion pursuant to Federal Rule of Civil Procedure 50(a) for judgment as a matter of law (formerly motion for a directed verdict), finding that "[t]here is no evidence of a prolonged encounter between Officer Boggs and the Plaintiff. Rather, the evidence demonstrates that the [collision and subsequent arrest] happened very quickly thereby denying Officer Noble a realistic opportunity to prevent Officer Boggs from tackling and cuffing Plaintiff." In addition, the court noted that "Plaintiff's expert never rendered an opinion as to whether Noble violated the accepted standard of care." On Thompson's remaining claim (excessive use of force by Officer Boggs), the jury returned a verdict in favor of Officer Boggs. Thompson appeals.

II. *ISSUES*

(1) Whether the trial court's dismissal of Thompson's denial of access to the courts claim was proper; (2) whether the court's denial of Thompson's motion to amend his pleadings for the third time to include an illegal seizure claim, after the court had granted the plaintiff the opportunity to amend his pleadings on two prior occasions in this case, was proper; (3) whether the

judge committed error in granting summary judgment to the defendants on Thompson's claim against the City of Havana, Illinois, and its police chief for condoning Boggs' alleged repeated use of excessive force; (4) whether the trial court's evidentiary rulings were erroneous; (5) whether the grant of Officer Noble's motion for judgment as a matter of law was proper; and (6) whether the district judge erred in denying the joinder of Brad Bailey as a plaintiff in Thompson's suit.

III. *DISCUSSION*

A. *Dismissal of Thompson's Access to Courts Claim.*

Thompson contends that Officers Boggs and Noble denied him access to the courts through their failure to set forth in their police reports the key facts that Boggs "lifted plaintiff from the pavement, threw him down to the pavement on his stomach, and then jumped onto plaintiff's back with a large amount of force." He alleges that by concealing critical facts from him which would form the basis of his claim for redress, the officers denied him effective and meaningful access to the courts.

1. *Standard of Review*

We review the grant of a motion to dismiss *de novo*. *Johnson v. Martin*, 943 F.2d 15,16 (7th Cir. 1991). "When reviewing the grant of a motion to dismiss, we must take as true all well-pleaded factual allegations and make all possible inferences in favor of the plaintiff." *Id.* "A complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

2. *Analysis*

In support of his claim that he was denied effective and meaningful access to the courts, Thompson relies on *Bell v.*

Milwaukee, 746 F.2d 1205 (7th Cir. 1984). In *Bell,* Daniel Bell was shot and killed by Thomas Grady, a Milwaukee police officer. Another officer, Louis Krause, observed Grady plant a knife in the deceased Bell's hand, and both officers falsely claimed in their respective police reports that Grady shot Bell because Bell had threatened Grady with the knife. Twenty years later, Krause revealed that he and Officer Grady had covered up the true circumstances of Daniel Bell's death. Bell's relatives and estate sued the City of Milwaukee, the police department, and the two officers alleging, among other things, that the cover-up of the shooting deprived them of their due process right of access to the courts because by concealing the true facts, the officers prevented Bell's family members from realizing that they had a cause of action and seeking redress. This court agreed that there was a constitutional right of access to the courts. *Id.* at 1261. Observing that under *Bounds v. Smith,* 430 U.S. 817, 822, 97 S. Ct. 1491 52 L. Ed. 2d 72 (1977), "judicial access must be 'adequate, effective, and meaningful'[,]" we stated that "[t]o deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right [of access to the courts] is lost where, as here, police officials shielded from the public and the victim's family key facts which would form the basis of the family's claim for redress." *Bell,* 746 F.2d at 1261. The officers' willful and intentional concealment of the truth "rendered hollow" the right of Bell's survivors to seek redress. *Id.*

The facts in Thompson's case are quite unlike the unique facts in *Bell.* Most significantly, unlike Bell's survivors the plaintiff Thompson herein was not deprived of adequate, effective, or meaningful access to the courts because he was personally involved in the incident and thus had firsthand knowledge of all the facts and circumstances surrounding his arrest. Thompson obviously was present at the scene and he recalled that "someone come down on my back." In addition, the plaintiff called two disinterested eyewitnesses to the arrest, Patti Lynch and Jeffrey

Cooper, both of whom observed and testified concerning the facts and circumstances surrounding Officer Boggs' arrest of Thompson.[2] Finally, the facts known to Thompson concerning the arrest were sufficient to enable him to promptly file the instant lawsuit unlike *Bell,* where the true facts were concealed thereby denying the plaintiffs the opportunity to file a lawsuit until some twenty years after the fact. Thus, because Thompson was not prohibited from seeking effective and meaningful redress in court, we conclude that under these facts the court did not err in dismissing Thompson's denial of access to the courts claim.

B. *Denial of Motion to Amend Second Amended Complaint*

Thompson next contends that the court erred in denying his motion to amend his second amended complaint to include an illegal seizure claim under *Brower* against Officer Noble, claiming that he was "seized" within the meaning of the Fourth Amendment when Noble allegedly positioned the squad car in the path of his motorcycle.[3] Thompson argues that he "did not know for certain he had a seizure claim against Officer Noble until he took [Noble's] deposition" to question Noble about his intent in using the squad car to arrest or seize him. He asserts that

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[2] Lynch testified that she thought Boggs treated Thompson "gently" while Cooper thought Boggs was "a little bit rough" considering Thompson had just been in an accident.

[3] In *Brower,* the Supreme Court considered a police department's use of a "deadman" roadblock to end a high-speed chase. A deadman roadblock is the positioning of a heavy and large obstacle in the road so as not to be visible to the oncoming fleeing driver. The Court concluded that the use of a deadman roadblock constitutes a seizure when it results in the termination of the suspect's freedom of movement. In *Donovan v. City of Milwaukee,* 17 F.3d 944, 948-49 (7th Cir. 1994), this court concluded that the intentional backing of a squad car into the path of a fleeing motorcycle, thereby terminating the motorcyclist's freedom of movement, constituted a seizure under the Fourth Amendment.

"[t]he complaint put Officer Noble [on notice] that his conduct . . . in operating the squad car would also be an issue."

"[G]ranting or denying a motion for leave to file an amended pleading is a matter purely within the sound discretion of the district court." *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991) (citing *Foman v. Davis*, 371 U.S. 178,182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). "Leave to amend the pleadings may be denied for 'apparent or declared reasons' such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.'" *Id.* (citing *Foman*, 371 U.S. at 182). "Therefore, a district court's denial of a motion to amend pleadings under Fed.R.Civ.P. 15(a) will be overturned on appeal only if it is shown that the district court abused that discretion by refusing to grant the leave without any justifying reason." *Id.*

We are of the opinion that the district judge did not abuse his discretion, after having allowed the plaintiff to amend his original pleading on two previous occasions, in refusing to allow Thompson to amend his complaint a *third time* to include an illegal seizure claim against Officer Noble. Thompson's proposed third amendment, which the trial court denied, came some three years and nine months after the collision between Thompson's motorcycle and Officer Noble's squad car, and less than one month before the case was set for trial and the trial was convened. "There must be a point at which a plaintiff makes a commitment to the theory of its case." *Johnson v. Methodist Medical Center*, 10 F.3d 1300,1304 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2102 (1994). Thompson and his counsel were certainly aware that he could have asserted an illegal seizure claim against Officer Noble before taking Noble's deposition; not only had *Brower* been decided prior to the day of the Thompson-Noble collision, but all three of Thompson's complaints noted

that as he rounded the corner of the hospital he observed a police car "parked crosswise in the lot blocking his path of escape." We conclude that the district judge did not abuse his discretion in denying Thompson's motion to file a third amended complaint.

C. *Alleged Trial Errors*

1. *Evidence of Habit or Practice of Using Excessive Force*

Thompson contends that the trial court erred in refusing to admit evidence (the affidavits from the other alleged victims and witnesses) that Boggs used excessive force on occasions other than July 29, 1989 (date of Thompson arrest). He submits that under Fed. R. Evid. 406 the affidavits are admissible as evidence establishing a habit or routine practice on Boggs' part. Thompson has failed to develop his argument or cite any legal authority, thus, under our Circuit's precedent, the argument is waived. *First Indiana Bank v. Baker,* 957 F.2d 506, 508 (7th Cir. 1992) ("[the appellant] has waived this issue, for he has failed to cite any pertinent authority for his argument . . ."); *United States v. Berkowitz,* 927 F.2d 1376, 1384 (7th Cir. 1991) ("[w]e repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"), *cert. denied,* 113 S. Ct. 1058 (1993). Even if Thompson had not waived the issue, he would not be entitled to relief for the following reasons.

In *Wheeler v. Sims,* 951 F.2d 796 (7th Cir.), *cert. denied,* 113 S. Ct. 320 (1992), we noted that "the appellant carries a heavy burden in challenging a trial court's evidentiary rulings on appeal because 'a reviewing court gives special deference to the evidentiary rulings of the trial court.' Thus, we will reverse such rulings only upon a showing that the trial court committed an abuse of discretion." *Id.* at 801-02 (quoting *United States v. Briscoe,* 896 F.2d 1476, 1489-90 (7th Cir.), *cert. denied,* 498 U.S. 863 (1990)) (internal quotations omitted). "[T]he abuse of discretion standard is met only when the trial judge's 'decision

is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision, or where the supposed facts found are clearly erroneous.' " *Id.* (quoting *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563-64 (7th Cir. 1984)).

Federal Rule of Evidence 406 provides that:

> "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

As the Advisory Committee noted in its Comment to Rule 406, habit "describes one's regular response to a repeated specific situation." "[B]efore a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature." *Simplex, Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290, 1293 (7th Cir. 1988).

> "The party offering the evidence must establish the habitual nature of the alleged practice. * * * Although there are no precise standards for determining whether a behavior pattern has matured into a habit, two factors are considered controlling as a rule: *adequacy of sampling and uniformity of response.* * * *The factors focus on whether the behavior at issue occurred *with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances.* * * *The requisite regularity is tested by the ratio of reaction to situations. * * * It is essential, therefore, that the *regularity of the conduct alleged to be habitual rest on an analysis of instances numerous enough to [support] an inference of systematic conduct*

> *and to establish one's regular response to a repeated specific situation."*

United States v. Newman, 982 F.2d 665, 668 (1st Cir. 1992), *cert. denied*, 114 S. Ct. 59 (1993) (quotations and citations omitted) (emphasis added).

In the present case, the trial judge ruled that "[a]s stated by the Advisory Committee Comment to Rule 406, habit describes one's regular response to a repeated specific situation. The prior and post-event incidents in question do not establish that Officer Boggs uses excessive force as a regular response to making arrests. Therefore, the court concludes that Rule 404 is applicable. Accordingly, such evidence is inadmissible." A careful review of the affidavits Thompson submitted makes clear the fact that Thompson has failed to establish that Boggs regularly responded with excessive force in a "semi-automatic" way to the situations he encountered. For example, Harvey Riggins' affidavit states that Officer Boggs struck him in the leg with a nightstick during a traffic stop. However, the same affidavit also recounts that prior to the contact, Riggins had stepped out of the car and "got into it"[4] with Boggs' colleague, Officer Seward, and that when Boggs attempted to place Riggins under arrest, Riggins stated that he "didn't do nothing [sic]" but admits he puiled his arm away from Boggs in an attempt to resist arrest.

Another alleged victim of Officer Boggs' excessive force, Jay Haas, averred that at the Havana Police Department following his arrest for driving under the influence of alcohol, Troy Barnett, a police dispatcher, held his (Haas') arms while Boggs struck him. However, in his affidavit Haas admitted that prior to the alleged use of force he was "upset" because it was his

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[4] Riggins' affidavit does not elaborate on the meaning of "got into it," but Officer Boggs' police report recounts that after calling Officer Seward several obscene names, Riggins "exited the vehicle and with his fists clinched [sic] walked at a very fast pace toward Officer Seward."

birthday and his girlfriend was having difficulty obtaining bond for his release. After speaking with his girlfriend on the phone, he "slammed [a] phone down . . . knock[ing] the dial tone out." Haas stated that when he broke the phone, Boggs called him a name, and that as a result he "got a little rowdy" and "said a few things [to Boggs] I didn't mean." It was at this point that Boggs allegedly struck Haas while Barnett held Haas' arms.

Finally, the affidavits of Roy Peters and Dan Flaherty, two more alleged victims of Boggs' excessive force, assert in conclusory fashion that Boggs used excessive force. They fail to set forth any details or specifics concerning how or under what conditions Boggs was supposed to have used excessive force, thus making it impossible to infer that Boggs' behavior was "semi-automatic" in nature. *See Simplex, Inc.*, 847 F.2d at 1293.[5]

In addition, with respect to the Thompson incident, it must be kept in mind that Boggs' arrest of Thompson came after a high-speed pursuit in which Thompson ran several stop signs and endangered people's lives while reaching speeds in excess of sixty miles per hour through the city and into the hospital parking lot. Furthermore, we must point out that the plaintiff's complaint acknowledged that Thompson had been attempting to elude the police, and we are of the opinion that Thompson's reckless driving while under the influence of alcohol endangered the lives of the officers and the individuals who were leaving the hospital when Thompson sped by. After the plaintiff, Thompson, collided with Officer Noble's squad car and had fallen to the ground, he crouched into a position resembling a sprinter's starting position, as if ready to continue his flight on foot. Officer Boggs tackled Thompson in an attempt to forestall his flight.

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[5] Thompson also submitted an affidavit of an alleged witness to the encounter Brad Bailey had with Officer Boggs. We discuss Bailey's claim in Section E of the opinion.

The affidavits presented in the five additional incidents and the evidence before us fails to demonstrate a habit of using excessive force. We agree with the trial court that the five unsubstantiated incidents of Officer Boggs' alleged excessive force, without any evidence of the total number of contacts Officer Boggs had with citizens or the number of arrests he performed, fail to satisfy the plaintiff's burden of demonstrating that Boggs' "regular response to a repeated specific situation" was the "systematic" use of excessive force. *Newman*, 982 F.2d at 668. Thompson has failed to establish that "the requisite regularity is tested by the ratio of reaction to situations." *Id.* (internal quotations omitted). Thus there is insufficient evidence to conclude that "the behavior at issue occurred with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances." *Id.* (internal quotations omitted). We therefore conclude the trial court did not err in refusing to admit evidence that Boggs used excessive force on his arrestees as a matter of habit.[6]

2. *Evidence that Boggs Violated the City's Policy on High-Speed Pursuits*

Thompson contends that the court abused its discretion when it prohibited him from mentioning during trial that Boggs' pursuit of him may have violated the City of Havana's general rule discouraging high-speed vehicular pursuits of traffic offenders.[7] Once again, Thompson's allegation fails to cite any

[6] We agree with the district court which held that Fed. R. Evid. 404 applies to the proffered evidence of Boggs' alleged use of excessive force on other occasions. The Federal Rules of Evidence expressly prohibit "Evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

[7] Havana, Illinois, Police Department Rule 16.01 provides as follows:

> PATROL—PURSUIT DRIVING: Automobile chases at high speeds are extremely dangerous to the chaser, the chased and the innocent

(Footnote 7 continued on next page)

legal authority in support of his argument that the court abused its discretion in precluding him from mentioning the City's general rule against such chases. Therefore, Thompson has waived the argument.

First Indiana Bank, 957 F.2d at 508; *Berkowitz*, 927 F.2d at 1384 ("[w]e repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"). In any event, we agree with the district court's conclusion that a violation of Havana's policy against the pursuit of traffic offenders was irrelevant. Evidence that Boggs may have violated City policy by pursuing Thompson at a high speed was irrelevant to the issue of whether Boggs used excessive force when arresting Thompson in the hospital parking lot.

3. *Characterizing Boggs' and Noble's Police Reports as "False"*

Thompson submits that the court erroneously prohibited him from characterizing Officers Boggs' and Noble's police reports as "false" and further alleges that the court ruled that the officers' reports were credible as a matter of law. Once again, he has waived the issue by failing to cite any authority in support of his argument. *Id.* Moreover, contrary to Thompson's contention, the trial court did not rule that the police reports were credible as a

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(Footnote 7 continued)

> public. They are to be avoided unless in the opinion of the officer the chased presents such a clear menace as to offset the danger of two (2) or more speeding automobiles. This judgment decision for the officer [is] similar in many respects to the problem of when to use a firearm. For this reason, high speed chases are discouraged, but not prohibited. They are sometimes necessary, ***but not often***. It is highly unlikely that you will be asked why you did not chase a speeder. There is always tomorrow.

(Emphasis in original)

matter of law. Rather, the court observed that "the police reports in question are not 'false' simply because they are not in agreement with reports of other witnesses." The court specifically ruled that the reports could be used to refresh the witnesses' recollection and Thompson was able to thoroughly cross-examine both Boggs and Noble about their involvement in apprehending Thompson. Thus, we conclude the court did not err in prohibiting Thompson from characterizing the police reports as false.

4. *Jury Instruction*

Thompson argues that the court committed reversible error when it refused to submit Thompson's proposed Jury Instruction No. 16, based on Illinois Pattern Instruction 12.04.[8] The record discloses that the court heard argument from the parties' attorneys on each proposed instruction, and that when the court stated "we will not give No. 16," counsel for Thompson remained silent and did not object to the judge's decision. As we stated in *Stachniak v. Hayes,* 989 F.2d 914, 920 (7th Cir. 1993), "Rule 51 of the Federal Rules of Civil Procedure provides that '[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.'" "[I]f a party fails to make a specific, timely jury instruction objection during trial, an argument regarding that jury instruction is deemed to be waived for purposes of appeal." *Id.* Thompson has waived the issue for appellate review.

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[8] The instruction read as follows:

> More than one person may be to blame for causing an injury. If you decide that the defendant['s] or defendants' conduct was a cause of the plaintiff's injury or damage, it is not a defense that some third person who is not a party to the suit may also have been to blame. However, if you find the sole proximate cause of injury to the plaintiff was a [sic] conduct of some person other than the defendant, or defendants, then your verdict shall be for defendants.

D. *Judgment as a Matter of Law for Officer Noble: Alleged Failure to Intervene*

The plaintiff-appellant alleges that the trial judge erred in granting Officer Noble's motion for judgment as a matter of law (Fed. R. Civ. P. 50(a)) with respect to Thompson's claim that Noble failed to prevent Boggs from using excessive force against him. The court granted the motion at the conclusion of the plaintiff's case-in-chief after finding that "[t]here is no evidence of a prolonged encounter between Officer Boggs and Plaintiff. Rather, the evidence demonstrates that the whole incident happened quickly thereby denying Officer Noble a realistic opportunity to prevent Officer Boggs from tackling and cuffing Plaintiff." "We review a Fed.R.Civ.P. 50(a) directed verdict [judgment as a matter of law] *de novo,* considering the evidence in the light most favorable to the nonmoving party. We will reverse the judgment only if enough evidence exists that might sustain a verdict for the non-moving party." *Continental Bank, N.A. v. Modansky,* 997 F.2d 309, 312 (7th Cir. 1993).

"An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under section 1983 for his nonfeasance." *Gaudreault v. Salem,* 923 F.2d 203, 207 n.3 (1st Cir. 1990), *cert. denied,* 500 U.S. 956 (1991). However, *"[a] police officer cannot be held liable for failing to intercede if he has no 'realistic opportunity' to prevent an attack." Id.* (citing *O'Neill v. Krzeminski,* 839 F.2d 9, 11-12 (2d Cir. 1988)) (emphasis added).

In this case, the undisputed testimony established that Officer Noble did not have an opportunity to participate in the physical apprehension of Thompson or to assist or prevent Boggs from acting as he did because Officer Boggs' restraining and controlling of Thompson was accomplished before Officer Noble even had an opportunity to get out of his squad car. Officer Noble testified as follows:

Q.: All right. What happened after this collision?

A.: Well, I said it took me kind of off guard. The motorcycle, the persons on the motorcycle just kind of disappeared from my peripheral vision. You know, there was just nobody in front of me. It was just gone. And it took me a few seconds, and Officer Boggs had run past.

Q.: Did you see him run past?

A.: Yes, I remember him just in front of my squad car.

Q.: All right. What did you do then?

A.: I put the car in park and exited my car and went to the aid of the passenger, the female.

Q.: What were Officer Boggs and Thompson doing as you went to the aid of the female?

A.: Well, the best I recall, Officer Boggs seemed to have the situation under control. I did not observe anything specifically that drew my attention to them.

Q.: Did you see Officer Boggs jump with his knee on Thompson's back?

A.: No, I did not. No, I did not.

Q.: Could you have seen that if it would have happened?

A.: Not in that time frame. I was not out of the car.

Because the evidence established that Noble did not have a realistic opportunity to prevent Boggs from using excessive force (even if Boggs had used excessive force, which of course the jury determined was not the case), we hold the district court did not err in granting Noble's motion for judgment as a matter of law.

E. *Joinder*

Thompson and appellant Brad Bailey contend that the court erred in refusing Bailey's motion to be joined as a plaintiff under Rules 20 and 21 of the Federal Rules of Civil Procedure. Bailey, like Thompson, alleges both that he was a victim of Officer Boggs' excessive use of force and that the City of Havana, Illinois, had a municipal policy of condoning Boggs' use of excessive force. Specifically, Bailey contends that on March 7, 1991, following a traffic stop during which he had been arrested for driving under the influence, Officer Boggs repeatedly struck him with his nightstick and fists while he (Bailey) was handcuffed. Bailey, who was represented by the same attorney as Thompson, moved to join as a plaintiff in Thompson's lawsuit and thus obtain a joint trial. The district court affirmed the magistrate judge's denial of Bailey's joinder motion, noting that "[t]he court finds no justification for adding Mr. Bailey to this case[.]" Neither the magistrate judge nor the district court gave any reasoning for their respective rulings.[9]

We review the denial of a motion to join a party for an abuse of discretion. *Intercon Research Assoc., Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 56 (7th Cir. 1982) (" '[t]he grant or denial of a motion to bring or drop a party lies in the discretion of the judge.... The trial court's exercise of discretion will not be disturbed on appeal unless an abuse is shown' ") (quoting 7 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1688 (1972)); *see also Arrington v. Fairfield*, 414 F.2d 687, 693 (5th Cir. 1969) ("[t]he provisions for permissive joinder under Rule 20 are very broad and the court is given

[9] We note that although neither the magistrate judge nor the district court judge were required to make detailed findings of fact and conclusions of law as mandated under Fed. R. Civ. P. 52(a), a brief statement of the reasons for denying the motion would be beneficial to the litigants as well as facilitate meaningful appellate review. Nonetheless, the record is sufficient to establish that the court did not abuse its discretion in denying Bailey's joinder motion.

discretion to decide the scope of the civil action and to make such orders as will prevent delay or prejudice"); *Allied Chem. Corp. v. Strouse, Inc.*, 53 F.R.D. 588, 589 (E.D. Pa. 1971) (holding that possible delay in the trial is a sufficient basis to deny joinder of a new party).

In this case, the record discloses that Bailey's allegation of Boggs' excessive use of force was based on an incident occurring on March 7,1991 (almost two years after the Thompson arrest); this incident concerns a separate occurrence, with a set of facts and circumstances that do not even resemble those upon which Thompson's suit was based. Moreover, the motion to join Bailey was made over a year after the initiation of Thompson's lawsuit and would have delayed adjudication of Thompson's claims (which arose some three years prior to Bailey's joinder motion). We agree with the trial judge's determination denying Bailey's joinder motion for adding Bailey to the lawsuit would only serve to confuse the jury by trying two separate and distinct injury claims and bringing in additional defendants (Bailey makes allegations against an Officer Ray and Deputy Barnes). Since there is no prejudice to Bailey in denying joinder, we conclude the trial court did not abuse its wide discretion in denying Bailey's motion for joinder.[10]

F. *Summary Judgment for the City and the Police Chief*

Thompson next contends the court erred in granting summary judgment in favor of the City of Havana, Illinois, and Police Chief Hardesty on his claim that the City and the police chief had

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[10] We add that the plaintiff has failed to direct us to any case, nor have we been able to locate any case, in which a court granted a motion to join made by a non-party to the lawsuit. It would seem that the proper course of action would be a motion to intervene under Fed. R. Civ. P. 24. *See Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 564 F. Supp. 1358,1371 (D. Del. 1983) (citing *Parker-Hannifin v. Samuel Moore & Co.*, 436 F. Supp. 498, 500 (N.D. Ohio 1977)).

a policy or custom of approving Officer Boggs' use of excessive force, as evidenced by their alleged failure to investigate Boggs' use of excessive force and discipline him for his unlawful actions. Thompson argues summary judgment was inappropriate because he presented evidence establishing that Boggs engaged in a pattern of using excessive force against arrestees. Specifically, Thompson points to the fact that he submitted affidavits from victims and witnesses of Officer Boggs' alleged use of excessive force on five separate occasions occurring over a twenty-two month period. Thompson claims that the City's and Police Chief Hardesty's failure to discipline Boggs after any or all of these incidents sufficiently establishes the existence of a municipal policy condoning Boggs' use of excessive force, or at least demonstrates their deliberate indifference toward Boggs' use of force. Thompson makes his allegation even though the defendants submitted an affidavit from the police chief that 1) Police Chief Hardesty required his officers to make written reports of their activities, 2) if the reports indicated that an officer used force against another person, Hardesty would investigate by questioning the officer about what happened, 3) if Hardesty was not satisfied with the information in the report and officer's explanation, he would conduct further investigation, 4) officers found to have used excessive force were disciplined, and 5) the City had a written policy which required that the "officers use only such force as was necessary under the circumstances." Hardesty Affidavit at ¶ 8.

In *Los Angeles v. Heller,* 475 U.S. 796 (1986) *(per curiam),* the Supreme Court addressed a similar situation in which after a jury found that a police officer had not used excessive force when apprehending a suspect, the trial court dismissed the claim against the city because once "the police officer had been exonerated by the jury there could be no basis for assertion of liability against the city or the persons constituting its Police Commission." *Id.* at 798. The Supreme Court agreed with the trial court, holding "this was an action for damages, and neither

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.* at 799. The Court added "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id.* Thus, to prevail on a *Monell* claim, the plaintiff must establish (1) that he suffered a constitutional injury, e.g., he was a victim of excessive force by a police officer, and (2) that the city authorized or maintained a custom of approving the unconstitutional conduct.

In the instant case, the plaintiff is asserting that the trial court erroneously granted summary judgment on the claim against the City and the police chief (the *Monell* claim). Even if there was error, it was harmless under Fed. R. Civ. P. 61, because the jury verdict in favor of Officer Boggs on the question of whether he used excessive force precludes the possibility that Thompson could prevail on his *Monell* claim. *Heller*, 475 U.S. at 799; *see also Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992) ("because [the officer] did not violate [the plaintiff's] constitutional rights, there is no basis for liability against the other defendants either") (citing *Heller); Myatt v. City of Chicago*, 816 F. Supp. 1259, 1264 (N.D. Ill. 1992) ("[i]f the individual officers are not held liable, the City cannot be held liable under a *Monell* claim") (citing *Heller*).[11]

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[11] We note that a recent Third Circuit decision, *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994), held that a city could be liable under *Monell* even though the individual officer was not liable. *Fagan* attempts to distinguish *Heller* on the grounds that in *Heller*, the plaintiff was only seeking to hold the City of Los Angeles liable under a theory of *respondeat superior*. That cannot

(Footnote 11 continued on next page)

IV. *CONCLUSION*

The judgment of the district court is

AFFIRMED.

CUDAHY, *Circuit Judge*, concurring. I agree with the majority's disposition of the case on the merits. I disagree, however, with the majority's holding that the plaintiffs have waived their challenges to the evidentiary rulings (a holding rendering the majority's subsequent discussions of the rulings dicta). The plaintiffs provided brief but fully comprehensible treatment of the issues in their briefs, and squarely presented to the court their claims. In the circumstances of the case, we are not required to find the argument waived simply because the plaintiff failed to cite relevant case law. *See, e.g., Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1234 (7th Cir. 1993) (waiver a flexible determination).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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(Footnote 11 continued)

be the case since *Monell* expressly holds that there is no cause of action for *respondeat superior* liability against a municipal corporation under 42 U.S.C. § 1983 *Monell*, 436 U.S. at 694-95. Thus we choose to follow the clear holding of *Heller* that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799.

APPENDIX Q

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 31, 1994

Before: Honorable RICHARD D. CUDAHY, Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable CHARLES R. NORGLE, Sr., District Judge*

No. 93-2891

ROBERT THOMPSON,
Plaintiff - Appellant

v.

ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Springfield Division
No. 91 C 3196, Richard Mills, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

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*Judge Charles R. Norgle, Sr., of the Northern District of Illinois, sitting by designation.

APPENDIX R

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 31, 1994
CORRECTED: September 6, 1994

Before: Honorable RICHARD D. CUDAHY, Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable CHARLES R. NORGLE, Sr., District Judge*

No. 93-2891

ROBERT THOMPSON,
Plaintiff - Appellant

v.

ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants - Appellees

No. 93-2892

ROBERT THOMPSON,
Plaintiff

and

BRAD BAILEY,
Appellant

v.

ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Springfield Division
No. 91 C 3196, Richard Mills, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on 8/31/94.

(1061-110393)

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*Judge Charles R. Norgle, Sr., of the Northern District of Illinois, sitting by designation

APPENDIX S

NICOARA & STEAGALL
Attorneys at Law
815 Commerce Bank Building
Peoria, Illinois 60602

JOHN P. NICOARA TELEPHONE 309-674-6085
RICHARD L. STEAGALL FACSIMILE 309-674-6032

September 13, 1994

Mr. Thomas F. Strubbe, Clerk FEDERAL EXPRESS
2710-A U.S. Courthouse
219 S. Dearborn Street
Chicago, IL 60604

Re: *Thompson & Bailey v. Boggs et al*
Seventh Circuit No. 93-2891 & 93-2892

Dear Sir:

In accordance with Circuit Rule 40(b), I enclose herewith 25 copies of the **Petition for Rehearing & Suggestion for Rehearing En Banc of Plaintiff-Appellant & Appellant** for filing. I also enclose herewith an original of a Proof of Service showing service on defense counsel.

Please acknowledge filing of these documents by file stamping the enclosed copy of this letter and returning it to me in the envelope provided. Thank you for your attention to this matter.

Very truly yours,

/s/ Richard L. Steagall
RICHARD L. STEAGALL

RLS/kap
Enclosures
pc: William A. Allison, Esq.
9/13/94

APPENDIX T

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 93-2891 and 93-2892

ROBERT THOMPSON,
Plaintiff - Appellant

and

BRAD BAILEY,
Appellant

v.

ROD BOGGS, A Police Officer of the City of Havana, KEVIN W. NOBLE, A Police Officer of the City of Havana, TOM HARDESTY, then-Chief of Police of the City of Havana, and the CITY OF HAVANA, ILLINOIS, et al.,
Defendants - Appellees

Appeal from the judgment of the United States District Court for the Central District of Illinois, Springfield Division.

No. 91-3196

The Honorable Richard Mills,
United States District Judge, Presiding

PLAINTIFF-APPELLANTS MOTION TO APPROVE FILING OF PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC SUBMITTED SEPTEMBER 14, 1994 OR, ALTERNATIVELY, FOR LEAVE TO FILE A CORRECTED PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC, INSTANTER

Now comes the Plaintiff-Appellant, ROBERT THOMPSON, by RICHARD L. STEAGALL, his attorney, and moves the

Court to Approve Filing of the Petition for Rehearing & Suggestion for Rehearing En Banc of Plaintiff-Appellant & Appellant Submitted on September 14, 1994 or Alternatively, for Leave to File a Corrected Petition for Rehearing & Suggestion for Rehearing En Banc and for such Motion states as follows:

1. The undersigned was informed by telephone message from the Office of the Clerk that the 25 copies of Petition for Rehearing & Suggestion for Rehearing En Banc of Plaintiff-Appellant & Appellant submitted to the Clerk for timely filing on September 14, 1994 was not in proper form because plaintiff had indented and single spaced the five separate issues in the panel opinion that conflict with other decisions in the one sentence statement required to be included at the outset of any filing suggesting a hearing en banc under Circuit Rule 40(c).

2. Plaintiff remains convinced that the form of the original Petition submitted is much more readable and that Rule 32 (a) of the Federal Rules of Appellate Procedure's requir[e]ment of double spaced typing did not intend to eliminate indentation and single spacing for emphasis and where it makes the material more readable, as a comparison with the corrected copies of the Petition that contain double spacing in the entire text of the first two pages submitted for alternative filing will confirm. The comparison will also reveal counsel's intent was to make the Petition more readable, not to circumvent page limitations. The corrected Petition also contains 15 pages with minor editing changes to shorten five additional lines that spilled onto page 16, which took counsel 10-15 minutes at the word processor.

3. Plaintiff has framed this Motion in the alternative, first requesting that the Petitions tendered on September 14, 1994 be accepted or alternatively, that the corrected copies tendered with this Motion be filed Instanter.

WHEREFORE, Plaintiff-Appellant, ROBERT THOMPSON, prays that this court enter an Order Approving the Filing

of the Petition for Rehearing & Suggestion for Rehearing En Banc of Plaintiff-Appellant & Appellant Submitted on September 14, 1994 or Alternatively, for Granting Them Leave to File 25 Copies of a Corrected Petition for Rehearing & Suggestion for Rehearing En Banc tendered with this Motion, Instanter.

ROBERT THOMPSON, Plaintiff-Appellant and
BRAD BAILEY, Appellant,

By: /s/ Richard L. Steagall
RICHARD L. STEAGALL,
their attorney

AFFIDAVIT

RICHARD L. STEAGALL, being first duly sworn on oath does hereby depose and state that he submitted the Petition for Rehearing & Suggestion for Rehearing En Banc in the format of indentation and single spacing of the five issues in the panel opinion that conflict with to her decisions not to avoid the page limitations, but because he believed that was the best and most readable way of presenting the material; that he is submitting this Motion in good faith for a ruling on the propriety of that format along with 25 copies of Corrected Petitions for Rehearing and Suggestion for Rehearing En Banc should the court rule the original format improper, and that this motion and the statements in this affidavit are true and correct to the best of his own knowledge, information, and belief.

/s/ Richard L. Steagall
RICHARD L. STEAGALL

Subscribed and sworn to before me
this 15th day of September, 1994

/s/ Kathleen A. Prendergast
Notary Public

OFFICIAL SEAL

RICHARD L. STEAGALL
JOHN P. NICOARA
815 Commerce Bank Building
Peoria, IL 61602
Telephone: (304) 674-6085

APPENDIX U

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

September 20, 1994

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

ROBERT THOMPSON,
Plaintiff-Appellant,

and

BRAD BAILEY,
Appellant,

Nos. 93-2891 and 93-2892

v.

ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Central District of Illinois, Springfield Division.

No. 91 C 3196

Richard Mills, Judge

Upon consideration of the "PLAINTIFF-APPELLANT'S MOTION TO APPROVE FILING OF PETITION FOR RE-HEARING & SUGGESTION FOR REHEARING EN BANC SUBMITTED SEPTEMBER 14, 1994 OR, ALTERNATIVELY, FOR LEAVE TO FILE A CORRECTED PETITION FOR

REHEARING & SUGGESTION FOR REHEARING EN BANC, INSTANTER" filed September 16, 1994, by counsel,

IT IS ORDERED that the motion is **GRANTED** in the alternative and the clerk is directed to file instanter the Corrected Petition for Rehearing with Suggestion for Rehearing En Banc.

APPENDIX V

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

NOTICE TO FILE AN ANSWER TO PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Date: September 20, 1994

Nos. 93-2891 and 93-2892

ROBERT THOMPSON,
Plaintiff - Appellant

and

BRAD BAILEY,
Appellant

v.

ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Springfield Division
No. 91 C 3196, Richard Mills, Judge

To: William A. Allison, Esq.
ALLISON & KELLY
202 N. Prospect
Bloomington, IL 61704

A petition for rehearing with suggestion for rehearing en banc was filed by counsel for Appellants on 9/20/94,

Counsel for Appellees are requested to file an answer to the petition by 10/4/94. Twenty-five copies of the answer, not to exceed fifteen pages in length and bound by the same color cover as your brief, are required.

cc: Richard L. Steagall

(1114-110493)

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 93-2891 and 93-2892

ROBERT THOMPSON,
Plaintiff - Appellant

and

BRAD BAILEY,
Appellant

v.

ROD BOGGS, A Police Officer of the City of Havana, KEVIN W. NOBLE, A Police Officer of the City of Havana, TOM HARDESTY, then-Chief of Police of the City of Havana, and the CITY OF HAVANA, ILLINOIS, et al.,
Defendants - Appellees

Appeal from the judgment of the United States District Court for the Central District of Illinois, Springfield Division.

No. 91-3196

The Honorable Richard Mills,
United States District Judge, Presiding

PLAINTIFF'S MOTION TO STRIKE ARGUMENT HEADING, PART IV, OF DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION FOR REHEARING

Now comes the Plaintiff-Appellant, ROBERT THOMPSON, by RICHARD L. STEAGALL, and pursuant to Rule 27 (a) of the Federal Rules of Appellate Procedure, moves the Court to enter an Order striking the Argument Heading of Part IV of Defendants' Response to Plaintiff's Petition for Rehearing and for such Motion states:

1. One of the grounds for rehearing is that the panel opinion misstates the record when it referred to an Order denying plaintiff's motion to amend his complaint. No such motion was made because plaintiff identified the claim in discovery and was going to include it in his statement of claims at the final pre-trial conference in accordance with *Ash v. Wallenmeyer*, 879 F.2d 272, 274 (7th Cir. 1989).

2. What plaintiff did was disclose the claim in discovery and then moved for summary judgment on the claims prior to the pre-trial conference. Docket # 46, 47, & 48. Judge Mills dismissed the claim with prejudice because it was not in the complaint. Docket # 80.

3. While Defendants may argue that amendment to the complaint was required, it not permissible for Defendants in their Answer to the Plaintiff's Petition for Rehearing to include an argument heading that implies that plaintiff filed motion for leave to amend his complaint when the record plainly shows that not to be the case.

5. Plaintiff suggests an Order striking the argument heading is appropriate.

WHEREFORE, Plaintiff-Appellant, ROBERT THOMPSON, prays that this Court enter an Order striking the Argument heading IV in Defendants' Response to Plaintiff-Appellant and Appellant's Petition for Rehearing as misleading.

ROBERT THOMPSON, Plaintiff-Appellant and
BRAD BAILEY, Appellant,

/s/ Richard L. Steagall
RICHARD L. STEAGALL,
their attorney

PROOF OF SERVICE

The undersigned certifies that a true and correct copy of this document was duly served upon the individuals set forth below by enclosing a copy of the same in an envelope addressed as set forth below and by depositing the envelope with postage fully prepaid in a U.S. Post Office Mail Box in Peoria, Illinois, on this 30th day of September, 1994:

Mr. William A. Allison
Allison & Kelly
202 North Prospect
Suite 204
Bloomington, IL 61704

/s/ Richard L. Steagall

RICHARD L. STEAGALL
JOHN P. NICOARA
416 Main Street, Suite 815
Commerce Bank Building
Peoria, IL 61602-1103
Telephone: (309) 674-6085

APPENDIX X

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

October 7, 1994

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

ROBERT THOMPSON,
Plaintiff-Appellant,
and
Brad Bailey,
Appellant,
Nos. 93-2891 and 93-2892
v.
ROD BOGGS, Police Officer of the City of Havana, KEVIN W. NOBLE, Police Officer of the City of Havana, TOM HARDESTY, Chief of Police of the City of Havana, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Central District of Illinois, Springfield Division.

No. 91 C 3196

Richard Mills, Judge

Upon consideration of the "PLAINTIFF'S MOTION TO STRIKE ARGUMENT HEADING, PART IV, OF DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION FOR REHEARING" filed on 10/3/94, by counsel for appellant Robert Thompson,

IT IS ORDERED that the motion is DENIED.

APPENDIX Y

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

November 8, 1994.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. CHARLES R. NORGLE, SR., District Judge *

ROBERT THOMPSON,
Plaintiff-Appellant,

No. 93-2891

v.

ROD BOGGS, Police Officer of the City of Havana, Illinois, KEVIN W. NOBLE, Police Officer of the City of Havana, Illinois, TOM HARDESTY, Chief of Police of the City of Havana, Illinois, et al.,
Defendants-Appellees.

ROBERT THOMPSON,
Plaintiff-Appellant,

No. 93-2892

v.

---

* Honorable Charles R. Norgle, Sr., of the Northern District of Illinois, sitting by designation.

ROD BOGGS, Police Officer of the City of Havana, Illinois, KEVIN W. NOBLE, Police Officer of the City of Havana, Illinois, TOM HARDESTY, Chief of Police of the City of Havana, Illinois, et al.,

Defendants-Appellees.

Appeals from the United States District Court For the Central District of Illinois, Springfield Division.

No. 91 C 3196

Richard Mills, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant and appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX Z

"CITY OF LOS ANGELES V. HELLER"

CITATIONS LIST

1. Acosta v. Louisiana Dept. of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192, 4 Fed.R.Serv. 3d 1064 (U.S.La., Jun 30, 1986) (NO. 85-1500)

2. Celotex Corp. v Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 54 USLW 4775, 4 Fed.R.Serv.3d 1024 (U.S. Dist.Col., Jun 25, 1986) (NO. 85-198)

3. City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (U.S. Cal., Apr 21, 1986) (NO. 85-531)

4. Betts (James R.) v. Greeley, City of, Colorado, Pugh (Russell S.), Greeley Municipal Court Judge, Monsson, (George N.), City of Greeley Attorney, Bratton (Peter), City of Greeley Police Officer __ F.3d __ (Table, Text in WESTLAW), Unpublished Disposition, 1995 WL 18279 (10th Cir.(Colo.), Jan 18, 1995) (NO. 94-1081)

5. Webber (Linda R.), Terhune (Albert R.) v. Mefford (Howard R.), Estate of Gibbs (Glen Dale), City of Sapulpa, Griffin (Tracy), as Police Officer for City of Sapulpa, Oklahoma, __ F.3d __, 1994 WL 703461 (10th Cir.(Okl.), Dec 19, 1994) (NO. 94-5018, 94-5019)

6. Denny v. Ford Motor Co., __ F.3d __, 1994 WL 685684 (2nd Cir.(N.Y.), Dec 06, 1994) (NO. 1671-93-7815)

7. Scott v. Henrich, 39 F.3d 912 (9th Cir.(Mont.), Nov 02, 1994) (NO. 91-35429)

8. Gilliam v. County of Los Angeles, 37 F.3d 1505 (Table, Text in WESTLAW), Unpublished Disposition, 1994 WL 551508 (9th Cir.(Cal.), Oct 06, 1994) (NO. 92-56006)

9. Grossman v. City of Portland, 33 F.3d 1200, 63 USLW 2168 (9th Cir.(Or.), Sep 06, 1994) (NO. 92-35492)

10. Haines v. Saginaw Police Dept., 35 F.3d 565 (Table, Text in WESTLAW), Unpublished Disposition, 1994 WL 445234 (6th Cir.(Mich.), Aug 17, 1994) (NO. 93-1980)

11. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 28 F.3d 1388, 29 Fed.R.Serv.3d 1240 (5th Cir.(Tex.), Aug 05, 1994) (NO. 93-1742)

12. Artes-Roy v. City of Aspen, 31 F.3d 958, 29 Fed.R.Serv.3d 1339 (10th Cir.(Colo.), Jul 28, 1994) (NO. 93-1448)

13. Abbott v. City of Crocker, No. 30 F.3d 994 (8th Cir.(Mo.), Jul 27, 1994) (NO. 93-2639)

14. Chew v. Gates, 27 F.3d 1432 (9th Cir.(Cal)., Jun 27, 1994) (NO. 91-55718)

15. Spears v. City of Louisville, 27 F.3d 567 (Table, Text in WESTLAW), Unpublished Disposition, 1994 WL 262054 (6th Cir.(Ky)., Jun 14, 1994) (NO. 93-5921)

16. Forrester v. City of San Diego, 25 F.3d 804 (9th Cir.(Cal.), Jun 01, 1994) (NO. 92-55137)

17. Fagan v. City of Vineland, 22 F.3d 1283 (3rd Cir. (N.J.), Apr 29, 1994) (NO. 92-5481, 92-5482, 92-5551, 92-5594)

18. Grant v. City of Los Angeles, 19 F.3d 27 (Table, Text in WESTLAW), Unpublished Disposition, 1994 WL 46313 (9th cir.(Cal.), Feb 15, 1994) (NO. 92-55820)

19. Pitchell v. Callan, 13 F.3d 545 (2nd Cir.(Conn.), Jan 03, 1994) (NO. 591-93-7538)

20. Garner v. Memphis Police Dept., 8 F.3d 358 (6th Cir.(Tenn.), Oct 22, 1993) (NO. 92-6196)

21. Johnson v. City of Cheyenne, 5 F.3d 546 (Table, Text in WESTLAW), Unpublished Disposition, 1993 WL 335802 (10th Cir.(Wyo.), Aug 26, 1993) (NO. 92-8079)

22. Fagan v. City of Vineland, 1993 WL 290386 (3rd Cir.(N.J.), Aug 05, 1993) (NO. 92-5481, 92-5482, 92-5551, 92-5594)

23. Hinton v. City of Elwood, Kan., 997 F.2d 774, 26 Fed.R.Serv.3d 147 (10th Cir.(Kan.), Jun 29, 1993) (NO. 91-3327)

24. Vukadinovich v. Zentz, 995 F.2d 750, 26 Fed.R.Serv.3d 188 (7th Cir.(Ind.), Jun 09, 1993) (NO. 92-2957)

25. Chamberlain v. City of Albuquerque, 991 F.2d 805 (Table, Text in WESTLAW), Unpublished Disposition, 1993 WL 96883 (10th Cir.(N.M.), Mar 29, 1993) (NO. 93-2089)

26. Turner v. White, 980 F.2d 1180, 37 Fed. R. Evid. Serv. 31 (8th Cir.(Mo.), Dec 02, 1992) (NO. 92-1015)

27. Gregory v. City of Rogers, Ark., 974 F.2d 1006, 61 USLW 2177 (8th Cir.(Ark)., Sep 09, 1992) (NO. 89-2863)

28. Robinson v. City of St. Charles, Mo., 972 F.2d 974 (8th Cir.(Mo.), Aug 14, 1992) (NO. 91-2243)

29. Gorio v. Block, 972 F.2d 1339 (Table, Text in WESTLAW), Unpublished Disposition, 1992 WL 185429 (9th Cir.(Cal.), Aug 05, 1992) (NO. 87-6334)

30. Tom v. Voida, 963 F.2d 952 (7th Cir.(Ind.), May 08, 1992) (NO. 91-2293)

31. Parrish v. Luckie, 963 F.2d 201, 35 Fed. R. Evid. Serv. 628 (8th Cir.(Ark.), Apr 30, 1992) (NO. 91-3336)

32. American Computech, Inc. v. National Medical Care, Inc., 959 F.2d 239 (Table, Text in WESTLAW), Unpublished Disposition, 1992 WL 66641 (9th Cir.(Cal.), Apr 03, 1992) (NO. 89-55289, 89-55290, 89-55293)

33. Dillinger v. Caterpillar, Inc., 959 F.2d 430, Prod.Liab.Rep. (CCH) P 13, 068 (3rd Cir.(Pa.), Feb 25, 1992) (NO. 91-3308)

34. Doe v. Sullivan County, Tenn., 956 F.2d 545, 35 Fed. R. Evid. Serv. 117 (6th Cir.(Tenn.), Feb 10, 1992) (NO. 90-5288, 90-5346, 90-5348)

35. Barber v. City of Salem, Ohio, 953 F.2d 232 (6th Cir. (Ohio), Jan 07, 1992) (NO. 91-3310)

36. Simmons v. City of Philadelphia, 947 F.2d 1042, 21 Fed.R.Serv.3d 966 (3rd Cir.(Pa.), Oct 18, 1991) (NO. 90-1118)

37. Gentile v. County of Suffolk, 926 F.2d 142, 32 Fed. R. Evid. Serv. 315 (2nd Cir.(N.Y.), Feb 11, 1991) (NO. 203, 90-7307, 90-7327)

38. Brown v. Grabowski, 922 F.2d 1097 (3rd Cir. (N.J.), Dec 31, 1990) (NO. 89-5487, 89-5532)

39. Neiman-Marcus Group, Inc. v Dworkin, 919 F.2d 368 (5th Cir.(Tex.), Dec 19, 1990) (NO. 89-7107)

40. Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir.(Ill.), Aug 23, 1990) (NO. 88-3488, 89-1115)

41. Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445 (10th Cir.(N.M.), Jun 19, 1990) (NO. 88-1595, 88-1910)

42. Hutchinson v. Town of Elktown, Va., 904 F.2d 700 (Table, Text in WESTLAW), Unpublished Disposition, 1990 WL 76580 (4th Cir.(Va.), May 24, 1990) (NO. 89-1008)

43. Belcher v. Oliver, 898 F.2d 32 (4th Cir.(W.Va.), Mar 12, 1990) (NO. 89-2918)

44. Reynolds v. City of Little Rock, 893 F.2d 1004, 58 USLW 2418 (8th Cir.(Ark.), Jan. 12, 19909) (NO. 88-2540)

45. Williams v. Borough of West Chester, Pa., 891 F.2d 458 (3rd Cir.(Pa.), Nov 21, 1989) (NO. 89-1052)

46. McKee v. City of Rockwall, Tex., 877 F.2d 409 (5th Cir.(Tex.), Jul 19, 1989) (NO. 87-1879)

47. Brooks v. Cook, 874 F.2d 815 (Table, Text in WESTLAW), Unpublished Disposition, 1989 WL 49322 (9th Cir. (Cal)., May 03, 1989) (NO. 87-6449)

48. Moss v. City of Colorado Springs, 871 F.2d 112 (10th Cir.(Colo.), Mahr 28, 1989) (NO. 86-1913)

49. Suttles v. City of Chattanooga, Tenn., 859 F.2d 153 (Table Text in WESTLAW), Unpublished Disposition, 1988 WL 98604 (6th Cir.(Tenn.), Sep 26, 1988) (NO. 86-5897)

50. Watson v. City of Kansas City, Kan., 857 F.2d 690, 57 USLW 2183 (10th Cir.(Kan.), Sep 14, 1988) (NO. 86-2501)

51. Frost v. Hawkins County Bd. of Educ., 851 F.2d 822, 48 Ed. Law Rep. 53 (6th Cir.(Tenn.), Jul 12, 1988) (NO. 86-5680, 86-5706)

52. Parker v. District of Columbia, 850 F.2d 708, 271 U.S.App. D.C. 15 (D.C.Cir., Jun 17, 1988) (NO. 87-7039)

53. U.S. v. Mentz, 840 F.2d 315, 24 Fed. R. Evid. Serv. 1154 (6th Cir.(Ohio), Feb 22, 1988) (NO. 87-3286)

54. Holloway v. McIntyre, 838 F.2d 471 (Table, Text in WESTLAW), Unpublished Disposition, 1988 WL 796 1 (6th Cir.(Mich.), Feb 04, 1988) (NO. 86-1001, 86-1898)

55. Dodd v. City of Norwich, 827 F.2d 1 (2nd Cir.(Conn.), Aug 31, 1987) (NO. 84-7780, 1006)

56. Clay v. Conlee, 815 F.2d 1164 (8th Cir.(Ark.), Apr 01, 1987) (NO. 86-1620)

57. Swink v. City of Pagedale, 810 F.2d 791 (8th Cir. (Mo.), Feb 02, 1987) (NO. 85-2384)

58. Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 55 USLW 2298 (9th Cir.(Cal.), Oct 24, 1986) (NO. 85-6289)

59. Kuklica v. City of Cleveland, 803 F.2d 720 (Table in WESTLAW), Unpublished Disposition, 1986 WL 17706 (6th Cir.(Ohio), Sep 15, 1986) (NO. 84-3991)

60. Praprotnik v. City of St. Louis, 798 F.2d 1168 (8th Cir.(Mo.), Aug 19, 1986) (NO. 85-1145, 85-1267, 85-1268)

61. McRorie v. Shimoda, 795 F.2d 780 (9th Cir.(Hawaii), Jul 28, 1986) (NO. 83-1541)

62. Palmerin v. City of Riverside, 794 F.2d 1409, 21 Fed. R. Evid. Serv. 1 (9th Cir.(Cal.), Jul 21, 1986) (NO. 85-5590)

63. Sanders v. Kennedy, 794 F.2d 478 (9th Cir.(Cal.), Jul 14, 1986) (NO. 84-6370)

64. Gottlieb (Andrew, Jean), Natural Parents of Infants Gottlieb (Dawn, Lee) v. County of Orange, Orange County Department of Social Services, Coppola (Esther), Employee of County of Orange, Orange County Department of Social Services, Douthart (Linda E.), Supervisory Employee of County of Orange, Orange County Department of Social Services, __ F.Supp. __, 1994 WL 705302 (S.D.N.Y., Dec 15, 1994) (NO. 93 CIV. 0466 (VLB))

65. Estate of Keys v. City of Harvey, 1994 WL 687479 (N.D.Ill., Dec 08, 1994) (NO. 92 C 2177)

66. Callahan v. Lancaster-Lebanon Intermediate Unit 13, 1994 WL 689083 (E.D.Pa., Dec 05, 1994) (NO. CIV.A. 93-CV-4250)

67. Burke v. Warren County Sheriff's Dept., 1994 WL 675042 (N.D.N.Y., Nov 25, 1994) (NO. 90-CV-597)

68. Kis v. County of Schuylkill, 866 F. Supp. 1462 (E.D.Pa., Oct 25, 1994) (NO. CIV. A. 93-CV-5750)

69. Long v. City of Kansas City, Kan., 1994 WL 327815 (D.Kan., Jun 30, 1994) (NO. CIV. A. 93-2073-EEO)

70. Tarkett, Inc. v. Congoleum Corp., 156 F.R.D. 608, 1994-1 Trade Cases P 70,639, 32 U.S.P.Q.2d 1359 (E.D.Pa., Jun 30, 1994) (NO. CIV. A. 91-4830)

71. Carroll v. Borough of State College, 854 F.Supp. 1184 (M.D.Pa., Jun 27, 1994) (NO. 3:CV-92-1000)

72. Redpath v. City of Overland Park, 857 F.Supp. 1448 (D.Kan., Jun 090, 1994) (NO. 92-2162-KHV, 92-2163-KHV)

73. Fraser v. County of Maui, 855 F.Supp. 1167 (D.Hawaii, Jun 07, 1994) (NO. CIV. 92-00635 ACK)

74. Sevier v. City of Lawrence, 853 F.Supp. 1360 (D.Kan., May 27, 1994) (NO. 92-4261-SAC)

75. Sunn v. City & County of Honolulu, 852 F.Supp. 903 (D.Hawaii, May 19, 1994) (NO. CIV. 93-00012 HMF)

76. Thompson v. City of Lawrence, 1994 WL 262598 (D.Kan., May 19, 1994) (NO. CIV. A. 93-2253-KHV, CIV. A. 93-2310-KHV)

77. James v. City of Chester, 852 F. Supp. 1288 (D.S.C., May 18, 1994) (NO. C.A. 3:92-812-17)

78. Brown v. Simmons, 1994 WL 144252 (N.D.N.Y., Apr 18, 1994) (NO. 89-CV-150)

79. Andrade v. City of Burlingame, 847 F.Supp. 760 (N.D.Cal., Mar 23, 1994) (NO. C-93-0453 MHP)

80. Linder v. Richmond County, GA. 844 F.Supp. 764 (S.D. Ga., Feb 11, 1994) (NO. CV 191-117)

81. In re City of Philadelphia Litigation, 849 F. Supp. 331 (E.D. Pa., Jan 25, 1994) (NO. CIV. A. 87-2678)

82. Farra v. Stanley-Bostitch, Inc., 838 F.Supp. 1021, Prod.Liab.Rep. (CCH) P 13,781 (E.D.Pa., Dec 06, 1993) (NO. CIV. A. 92-995)

83. Williams v. Markel, 1993 WL 498203 (N.D.N.Y., Nov 29, 1993) (NO. 92-CV-1162)

84. Webber v. Mefford, 1993 WL 762602 (N.D.Okl., Nov 16, 1993) (NO. 93-C-636-B)

85. Terhune v. Mefford, 1993 WL 76 2601 (N.D.Okl., Nov 09, 1993) (NO. 93-C-635-B)

86. Sassower v. City of White Plains, 1993 WL 378862 (S.D.N.Y., Sep 24, 1993) (NO. 89 CIV. 1267 (MJL))

87. Eberts v. Wert, 1993 WL 304111 (E.D.Pa., Aug 09, 1993) (NO. 92-CV-3913)

88. Camps v. City of Warner Robins, 822 F.Supp. 724 (M.D.Ga., May 19, 1993) (NO. CIV.A.921032 MAC(WDO))

89. Hahn v. County of Otsego, 820 F.Supp. 54 (N.D.N.Y., May 96, 1993) (NO. 92-CV-337)

90. Jenks v. Hull, 1993 WL 112447 (N.D.Cal., Apr 07, 1993) (NO. C-92-3747-EFL)

91. Plakas v. Drinski, 811 F.Supp. 1356 (N.D.Ind., Jan 15, 1993) (NO. CIV. H91-365)

92. Hill v. Serpico, 1993 WL 15614 (E.D.Pa., Jan 13, 1993) (NO. CIV. A. 92-0374)

93. Myatt v. City of Chicago, 816 F.Supp. 1259, 25 Fed.R.Serv.3d 1511, 82 Ed. Law Rep. 104 (N.D.Ill., Nov 24, 1992) (NO. 90 C 3991)

94. Kellam v. City of Philadelphia, 1992 WL 309631 (E.D.Pa., Oct 19, 1992) (NO. CIV. A. 91-6092)

95. U.S. v. Hughes Aircraft Co., Inc., 1992 WL 478116 (C.D.Cal., Sep 08, 1992) (NO. CRIM. 91-1022 WMB)

96. Fulkerson v. City of Lancaster, 801 F.Supp. 1476 (E.D.Pa., Aug 24, 1992) (NO. CIV. A. 91-2058)

97. Saviour v. City of Kansas City, Kan., 1992 WL 223804 (D.Kan., Aug 19, 1992) (NO. CIV. A. 90-2430-L)

98. Fagan v. City of Vineland, 804 F.Supp. 591 (D.N.J., Jul 30, 1992) (NO. CIV. A. 90-310 (WGB))

99. Clements v. Prince George's County Government, 1992 WL 165814 (D.Md., Jun 30, 1992) (NO. CIV. A. HAR 90-1878)

100. Sanders v. City of Edwardsville, Kan., 1992 WL 166995 (D.Kan., Jun 30, 1992) (NO. CIV. A. 90-23460O)

101. Riccitui v. New York City Transit Authority, 796 F.Supp. 84 (S.D.N.Y., Jun 04, 1992) (NO. 90 CIV. 2823 (CSH)

102. Deagle v. City of New York, 1992 WL 116368 (S.D.N.Y., May 24, 1992) (NO. 90 CIV. 8203 (LJF))

103. Blackmon v. Perez, 791 F.Supp. 1086 (E.D.Va., May 05, 1992) (NO. CIV. A. 91-552-N., CIV A. 91-553-N)

104. Troublefield v. City of Harrisburg, Bureau of Police, 7898 F.Supp. 160 (M.D.Pa., Apr 08, 1992) (NO. CIV.A. 1:CV-92-0096)

105. Ratti v. City and County of San Francisco, 1992 WL 281386 (N.D.Cal., Mar 28, 1992) (NO. C-89-3577-RFP)

106. Fisher v. City of New York, 1992 WL 77606 (S.D.N.Y., Mar 23, 1992) (NO. 90 CIV. 8163 (LJF))

107. Williamson v. City of Virginia Beach, Va., 786 F.Sup. 1238 (E.D.Va., Mar 13, 1992) (NO. CIV. A. 90-1861-N)

108. Marryshow v. Town of Bladensburg, 139 F.R.D. 318 (D.Md., Oct 31, 1991) (NO. CIV. A. MJG-90-1470)

109. Evan v. Morales, 775 F.Supp. 271, 70 Ed. Law Rep 829 (N.D.Ill., Oct 08, 1991) (NO. 91 C 2451)

110. Hinton v. City of Elwood, Kan., 1991 WL 205035 (D.Kan., Sep 09, 1991) (NO. CIV. A. 89-2340-O)

111. Tom v. Voida, 1991 WL 343377 (S.D.Ind., May 03, 1991) (NO. IP 89 857 C)

112. Simmons v. Chemung County Dept. of Social Services, 770 F.Supp. 795 (W.D.N.Y., Apr 01, 1991) (NO. CIV-90-560T)

113. Craig v. Krzeminski, 764 F.Supp. 248 (D.Conn., Mar 20, 1991) (NO. CIV. N-88-159 (WWE))

114. Estate of Dawson v. Williams, 1991 WL 34304, E.D.Pa., Mar 11, 1991) (NO. CIV. A. 90-1482)

115. Kocienski v. City of Bayonne, 757 F.Supp. 457 (D.N.J., Feb 22, 1991) (NO. CIV.A. 90-1930 (MTB))

116. Smith v. City of Joliet, 809 F.Supp. 48 (N.D.Ill., Feb 05, 1991) (NO. 89 C 6246)

117. D.C.A. Development Corp. v. Ogden City Mun. Corp., 1991 WL 338568 (D.Utah Jan 10, 1991) (NO. 87-NC-0040J)

118. Zwalesky v. Manistee County, 749 F.Supp. 815 (W.D.Mich., Aug 16, 1990) (NO. 1:89-CV-794)

119. Culpepper v. Biggers, 742 F.Supp. 528 (E.D.Ark., Aug 14, 1990) (NO. LR-C-89-851)

120. Montgomery v. County of Clinton, Mich., 743 F.Supp. 1253 (W.D.Mich., Jul 30, 1990) (NO. L89-50002 CA)

121. Rodriguez v. City of Passaic, 730 F.Supp. 1314 (D.N.J., Feb 21, 1990) (NO. CIV.A. 85-1911(MTB))

122. Willis V. Bell, 726 F.Supp. 1118 (N.D.Ill., Dec 04, 1989) (NO. 86 C 9589)

123. Britt v. Little Rock Police Dept., 721 F.Supp. 189 (E.D.Ark., Aug 29, 1989) (NO. LR-C-88-875)

124. Newcomb v. City of Troy, 719 F.Supp. 1408 (E.D.Mich., Aug 18, 1989) (NO. 88-71391-DT)

125. Cacciotti v. City of Cortland, 1989 WL 71716 (N.D.N.Y., Jun 29, 1989) (NO. 85-CV-282)

126. Gilbert v. Pekich, 1989 WL 75442 (N.D.Ill., Jun 27, 1989) (NO. 88 C 5380)

127. Harbin v. City of Alexandria, 712 F.Supp. 67 (E.D.Va., Apr 25, 1989) (NO. CIV A 88-1494-A)

128. Carapellucci v. Town of Winchester, 707 F.Supp. 611 (D.Mass., Feb 03, 1989) (NO. CIV. A. 85-4561-K)

129. Estate of Jackson v. City of Rochester, 705 F.Supp. 779 (W.D.N.Y., Jan 31, 1989) (NO. CIV. 86-0615L)

130. Matthews v. City of Atlanta, 699 F.Supp. 1552 (N.D.Ga., Oct 19, 1988) (NO. CIVA1:87-CV-0026JOF)

131. Lach v. Robb, 679 F.Supp. 508, 45 Ed. Lawe Rep. 643 (D.Pa., Feb 16, 1988) (NO. CIV A 87-468)

132. In re Scott County Master Docket, 672 F.Supp. 1152 (D.Minn., Nov 02, 1987) (NO. CIV 3-85-774, 4-84-1066, CIV. 4-84-1214, CIV. 4-84-1230, CIV. 3-84-1615, CIV. 3-85-138, CIV. 4-84-1204, CIV. 4-84-1208, CIV. 3-85-1091)

133. Muhammad v. City of Chicago, 1987 WL 15754 (N.D.Ill., Aug 10, 1987) (NO. 86 C 4514)

134. Beddingfield v. City of Pulaski, Tenn., 666 F.Supp. 1064 (M.D. Tenn., Jul 17, 1987) (NO. 1-85-0091)

(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 94-1348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT THOMPSON and BRAD BAILEY,
Petitioners,

v.

ROD BOGGS, a Police Officer of the City of Havana, KEVIN W. NOBLE, a Police Officer of the City of Havana, then Chief of Police of the City of Havana, and THE CITY OF HAVANA, ILLINOIS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT *CITY OF LOS ANGELES v. HELLER*, 475 U.S. 796 (1986) BARS A CLAIM FOR MUNICIPAL LIABILITY BASED ON A POLICY OF CONDONING EXCESSIVE FORCE WHERE THE INDIVIDUAL OFFICER IS FOUND NOT GUILTY OF USING EXCESSIVE FORCE.

II.

WHETHER THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER'S RIGHT OF ACCESS TO THE COURTS WAS NOT VIOLATED BY THE OFFICERS' ALLEGED FAILURE TO (1) LIST WITNESSES, (2) DOCUMENT PETITIONER'S INJURIES, AND (3) ADMIT TO HAVING USED EXCESSIVE FORCE IN THEIR REPORTS.

III.

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S TARDY ATTEMPT TO PURSUE AN UNREASONABLE SEIZURE CLAIM UNDER *BROWER v. COUNTY OF INYO*, 489 U.S. 593 (1989).

IV.

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S REFUSAL TO JOIN ANOTHER PARTY TO THE CASE.

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No. 94-1348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT THOMPSON and BRAD BAILEY,

Petitioners,

v.

ROD BOGGS, a Police Officer of the City of Havana, KEVIN W. NOBLE, a Police Officer of the City of Havana, then Chief of Police of the City of Havana, and THE CITY OF HAVANA, ILLINOIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

NO INTER-CIRCUIT CONFLICT EXISTS OVER THE APPLICATION OF *CITY OF LOS ANGELES v. HELLER*, 475 U.S. 796 (1986) TO THE CIRCUMSTANCES OF THIS CASE.

The Seventh Circuit correctly held that *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) barred Petitioner's municipal liability claim. In *Heller*, the Court held that a municipality cannot be held liable for condoning excessive force where a jury rejected the plaintiff's claim of excessive force against the individual officer. *Id.* at 798. In doing so, the Court stated that "this was an action for damages, and neither *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.* at 799. The Court further added that "[if] a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id.* (emphasis in original).

As in *Heller*, the jury in the instant case returned a verdict for the individual defendant, Officer Boggs, on Petitioner Thompson's excessive force claim. *Thompson v. Boggs*, 33 F.3d 847, 851 (7th Cir. 1994). The District Court had previously granted summary judgment in favor of the City of Havana (City) on Petitioner's municipal liability claim, which was premised on the City's failure

to discipline Officer Boggs for prior alleged instances of excessive force against other citizens. The Seventh Circuit found it unnecessary, in light of *Heller*, to review the propriety of the grant of summary judgment to the City because "the jury verdict in favor of Officer Boggs on the question of whether he used excessive force precludes the possibility that Thompson could prevail on his *Monell* claim." *Thompson*, 33 F.3d at 859.

Petitioner's attempt to establish an inter-circuit conflict as to the application of *Heller* under these circumstances is misdirected. First, he erroneously relies upon *Parrish v. Luckie*, 963 F.2d 201, 203 (8th Cir. 1992), which is entirely inapposite because the police officer defendant in that case was found to have deprived the plaintiff of her constitutional rights. *See Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 n.3 (8th Cir. 1992) (applying *Heller* and distinguishing *Parrish* because the defendant police officers did not violate the plaintiff's constitutional rights).

Second, Petitioner's reliance on *Moss v. City of Colorado Springs*, 871 F.2d 112, 114 (10th Cir. 1989) is particularly puzzling. In *Moss*, the Tenth Circuit actually applied *Heller* to overturn a verdict against a city on an illegal search claim where the jury had returned a verdict in favor of the individual police officers on the same claim. In doing so, the court acknowledged that the municipality might have been liable if the individual defendants had escaped liability on the basis of an affirmative defense, such as qualified immunity, which was unavailable to the municipality. *Id.* at 114. A contrary rule would permit municipalities to circumvent, through reliance on *Heller*, this Court's determination that a municipality is not entitled to assert an immunity defense. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980). However, since the jury was not instructed on any affirmative defenses,

the *Moss* court concluded that "[t]he officers were in the same position as the City on this point. . . . [and] the jury, it would appear, imposed liability on the City despite a conclusion that the officers were not guilty of a constitutional violation." *Id. See also Hinton v. City of Elmwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) (holding that since the officers' conduct did not give rise to a constitutional violation, the court did not "need to reach the issue of whether the city acted with deliberate indifference"); *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445, 1447 (10th Cir. 1990) ("[w]hen there is no underlying constitutional violation by a county officer, there cannot be an action for failing to train or supervise the officer.")

Similarly, Respondent Boggs did not avoid liability on Petitioner Thompson's excessive force claim on the basis of qualified immunity or any other affirmative defense, but rather, he prevailed on the basis of a jury verdict rejecting Thompson's constitutional claim for excessive force. Consistent with *Moss*, therefore, any verdict against the City on Thompson's excessive force claim would have been inappropriate.

Finally, Petitioner's reliance on *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994), is also misdirected. In *Fagan*, the court held that a municipality could be liable under § 1983 for deliberate indifference in training its police officers in pursuit techniques even if the individual officer did not violate principles of substantive due process because his conduct was not so egregious as to "shock the conscience." *Id.* at 1292.

Unlike *Heller* and the instant case, *Fagan* involved a scenario in which the threshold of proof needed to prove a claim against the individual officer was greater than

what was needed to prove a claim against the municipality. Poor training in pursuit techniques can foreseeably lead to car accidents even where the officer's own conduct was appropriate, or merely negligent, and thus, constitutionally sound. In such cases, it arguably makes less sense to allow the city to avoid liability for deliberately indifferent training procedures simply because the officer's conduct was not so egregious as to "shock the conscience." *But see Temkin v. Frederick County Com'rs*, 945 F.2d 716, 724 (4th Cir. 1991) (no municipal liability for inadequate pursuit training absent a constitutional violation by inadequately trained officer), *cert. denied*, 502 U.S. 1095 (1992); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir. 1989) (same).

In the excessive force context, by contrast, it would be illogical to hold a municipality responsible for condoning unreasonable force when it has been determined that the Plaintiff was not a victim of excessive force. Liability under those circumstances would contravene the principle that a § 1983 plaintiff must establish a compensable injury as a precondition to recovery. *See, e.g., Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299 (1986).

In light of that discussion, any inter-circuit conflict concerning whether *Heller* applies where the elements of the municipal liability claim are less stringent than and independent of the elements of the claim against the individual officer, is not implicated in the excessive force context, where the opposite is true. Municipal liability for condoning excessive force is, by nature, dependent on a finding that the plaintiff was subjected to the use of unreasonable force. For that reason, no court has ever held that *Heller* is inapplicable to a claim alleging municipal liability for a police officer's use of unreasonable force in arrest.

II.

ANY INFORMAL MUNICIPAL POLICY CONDONING EXCESSIVE FORCE WAS IRRELEVANT TO PETITIONER'S EXCESSIVE FORCE CLAIM AGAINST OFFICER BOGGS.

Petitioner contends that *Heller* did not precisely address whether "an informal municipal policy of deliberate indifference to excessive force [is] relevant to the determination of whether an individual officer in fact used excessive force" (Pet. Br., p. 17). For that reason, Petitioner argues that the district court's grant of summary judgment in favor of the City interfered with his ability to prove his individual claim for excessive force against Officer Boggs at trial. Essentially, Petitioner sought to prove that Boggs used excessive force against him by introducing evidence of other incidents in which the City failed to discipline Boggs for allegedly using excessive force against other citizens. In support of that effort, Petitioner boldly states, with no citation to authority, that an "informal" municipal policy of deliberate indifference to the use of excessive force "makes it more likely that an individual officer in fact used excessive force" (Pet. Br., p. 19).

Petitioner's argument lies in direct contravention of Federal Rule of Evidence 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). The principle behind this rule is "that evidence of crimes or acts other than those charged should not be admissible merely to show that the defendant, having committed other bad acts, has a propensity toward crime or bad character." *U.S. v. Torres*, 977 F.2d 321, 325 (7th Cir. 1992). Courts have commonly applied Rule 404(b) to prevent plaintiffs in excessive force cases from introducing evidence of a police officer's prior alleged acts of excessive

force in order to prove that the police officer acted in conformity with those acts on a particular occasion. *See, e.g., Sherrod v. Berry*, 827 F.2d 195, 206 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir.), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 976 (8th Cir. 1992); *Perri v. Daggy*, 776 F.Supp. 1345, 1348 (N.D. Ind. 1991); *Eigeman v. City of Great Falls*, 723 F.Supp. 522, 525 (D. Mont. 1989).

Yet, that is exactly what Petitioner seeks to accomplish in this case. The evidence proffered by Petitioner consisted of the City's allegedly insufficient response to six alleged incidents of excessive force committed by Officer Boggs over the course of twenty months and its failure to act on a "petition signed by 51 citizens complaining of Officer Boggs' use of excessive force" (Pet. Br., p. 9). Through such evidence, Petitioner clearly sought to persuade the jury that "where there's smoke, there's fire", in direct contravention of Rule 404(b). Petitioner's proffered evidence of municipal liability was thus inadmissible under Rule 404(b) against Officer Boggs.[1] Accordingly, the court of appeals correctly concluded that any alleged error in granting the City's Motion for Summary Judgment on the municipal liability claim would have been harmless in light of the subsequent jury verdict in favor of Officer Boggs and this Honorable Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

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[1] Petitioner does not allege that any of the six alleged incidents on which he relies were ever proven or resulted in a civil or criminal conviction such that their admissibility would be governed by standards other than those encompassed within Rule 404(b). *See* Fed. R. Evid. 609 (governing admissibility of prior convictions).

III.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER'S RIGHT OF ACCESS TO THE COURTS WAS NOT VIOLATED BY THE OFFICERS' ALLEGED FAILURE TO (1) LIST WITNESSES, (2) DOCUMENT PETITIONER'S INJURIES, AND (3) ADMIT TO HAVING USED EXCESSIVE FORCE IN THEIR REPORTS.

Petitioner claims the Court of Appeals erroneously upheld the dismissal of his right of access to the courts claim. Specifically, Petitioner claims that the Respondent officers shielded key facts from him by (1) omitting certain witnesses from their reports, (2) failing to document Petitioner's injuries, and (3) failing to document the fact that Officer Boggs allegedly "lift[ed] the plaintiff, who was lying semi-conscious on the pavement posing no threat of injury or escape and threw him down on the pavement onto his back with great force" (Pet. Br., pp. 5-6).

A citizen's right of access to the courts is guaranteed under both the First and Fourteenth Amendments. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Bounds v. Smith*, 430 U.S. 817, 822 (1977). The primary focus in these types of cases is whether the conduct of the governmental actor impeded the citizen's "adequate, effective and meaningful" access to the courts. *Bounds*, 430 U.S. at 822. A plaintiff must show that the defendant's conduct actually impeded his ability to pursue his case. *See e.g., Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987); *Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983).

In rejecting Petitioner's right of access claim, the Court of Appeals correctly pointed out that the essential facts which formed Petitioner's excessive force claim were known to him at the time of the incident, and thus, the

officers' alleged omissions did not effectively impede his access to the courts. 33 F.3d at 852. Although Petitioner points out that he claimed he was only "semi-conscious" throughout the whole ordeal, he has not contended that his state of consciousness interfered with his perception of events on the day of his encounter with Respondents. Indeed, Petitioner's allegations of excessive force were based on his personal perceptions of the events on the day of the incident. Moreover, Petitioner was able to learn the extent of his injuries from medical personnel.

Petitioner incorrectly argues that the dismissal of his right of access claim was inconsistent with three federal circuit court decisions. In both *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) and *Ryland v. Shapiro*, 708 F.2d 967, 973 (5th Cir. 1983), the defendant governmental officials allegedly participated in lengthy cover-ups of the true facts surrounding the murder of a citizen. Concluding in *Bell* that the cover-up denied the victim's survivors access to the courts for approximately twenty years, the Seventh Circuit stated that "[after] the reckless and completely inexcusable killing by a police officer, instead of searching for and revealing the true circumstances the conspirators did everything in their power to cover up and conceal the facts within their sole control." *Bell*, 746 F.2d at 1264. Similarly, in *Ryland*, the court remanded the case for a determination of whether the parents of a victim were denied access to the court due to a conspiracy by district attorneys to cover-up the victim's murder for eleven months. *Ryland*, 708 F.2d at 969, 972-73.

In marked contrast to the two cases Petitioner analogizes to, the Petitioner did not need to rely on the police reports to obtain access to the courts. Although Petitioner contends the court of appeals has set up a bright line distinction conditioning right of access claims on the victim's

death, the lower court did no such thing. To the contrary, the court simply acknowledged that a right of access claim requires proof that access to the courts was, in fact, impeded. The death of the victim can obviously play a large role in that determination. Without the victim's testimony, survivors are often at the mercy of the involved governmental actors, particularly in the absence of independent witnesses. Under those circumstances, a police cover-up of the true facts is far more likely to derail the filing of a lawsuit, than where, as here, the victim is able to recount his version of events.

Petitioner also relies erroneously on the Fifth Circuit's decision in *Hale v. Townley*, 19 F.3d 1068 (5th Cir. 1994). After succeeding on his initial § 1983 suit against two law enforcement officials, the plaintiff in *Hale* again filed suit, alleging that the defendant officers attempted to frame him for criminal activity in retaliation for his successful lawsuit. *Id.* at 1071. These allegations were held sufficient to state a cause of action for interference with the plaintiff's right of access to the courts. *Id.* at 1072.

In contrast to *Hale*, the case at bar does not involve retaliation against Petitioner for filing a prior lawsuit or for any other conduct. Therefore, *Hale* provides no support for Petitioner's attempt to pursue a right of access claim.

In sum, Petitioner has simply never alleged that any of the Respondents' alleged omissions actually impeded his access to the courts. That the fact alone fully supported the dismissal of his right of access claim.

IV.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PLAINTIFF'S TARDY ATTEMPT TO PURSUE AN UNREASONABLE SEIZURE CLAIM UNDER *BROWER v. COUNTY OF INYO,* 489 U.S. 593 (1989).

Petitioner contends the court of appeals improperly upheld the district court's denial of his efforts to present an unreasonable seizure claim to the jury based upon Officer Noble's use of his squad car to stop Petitioner's motorcycle and this Court's decision in *Brower v. County of Inyo*, 489 U.S. 593 (1989).

"Leave to amend the pleadings may be denied for 'apparent or declared reasons' such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.' " *Foman v. Davis*, 371 U.S. 178, 182 (1962). Moreover, "granting or denying a motion for leave to file an amended pleading is a matter purely within the sound discretion of the district court." *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991) (citing *Foman*, 371 U.S. at 182).

Despite that wide discretion, Petitioner distorts Seventh Circuit precedent to conclude that he had an absolute entitlement to pursue, at trial, all claims which were suggested during discovery, regardless of when he sought to plead those claims, if ever. Petitioner relies on *Ash v. Wallenmeyer*, 879 F 2d 272 (7th Cir. 1989), for the proposition that "it was not necessary for a plaintiff to amend his complaint to assert additional claims arising out of the occurrence referred to in the complaint." (Pet. Br., p. 27).

Contrary to Petitioner's assertion, *Ash* did not dispense with the requirement that a pleader must plead his claims

against a defendant. *See* Fed. R. Civ. P. 8. *Ash* simply concluded that where the nature of a proposed amendment was already apparent from the pleadings on file, a defendant who is not surprised or prejudiced by the amendment cannot rely on the delay in order to defeat the claim. *Ash*, 879 F.2d at 274. Also, in *Ash*, the amendment concerned only the amount of damages sought. *Id.*

In the present case, by contrast, the district court was well within its discretion in concluding that the Respondents were surprised and prejudiced by Petitioner's eleventh hour attempt to add a brand new substantive claim. While Petitioner's purported *Brower* claim focused on the chase and the collision between Officer Noble's squad car and Petitioner's motorcycle, all three of Petitioner's complaints had alleged claims based upon his encounter with Officer Boggs, which took place well after the collision had already occurred. The mere allegation that Officer Noble had positioned his vehicle to stop Plaintiff's motorcycle was clearly insufficient to alert either Respondents or the district court to Petitioner's intent to pursue a *Brower* claim. Accordingly, the district court was well within its discretion in concluding that the assertion of such a claim on the eve of trial would have significantly expanded the scope of the trial and exposed Respondents to an entirely different set of risks not ascertainable from the pleadings.

Moreover, as the court of appeals noted, Petitioner did not seek to add his unreasonable seizure claim under *Brower v. County of Inyo*, 489 U.S. 593 (1989), for "some three years and nine months after the collision between Thompson's motorcycle and Officer Noble's squad car, and less than one month before . . . trial was convened." 33 F.3d at 853. This delay was unjustifiable because the facts underlying the unreasonable seizure claim were known to

Petitioner at the time he filed his original complaint. *Id.* Even if Petitioner was correct in his assertion that he did not know all the facts to support a *Brower* claim until the officers' depositions in late 1992, he has not even attempted to explain his failure to alert either Respondents or the district court to his intention to pursue a *Brower* claim until the eve of trial, some six months later. In light of those circumstances, the district court correctly prohibited Petitioner from pursuing a brand new substantive claim at trial which was wholly separate from the excessive force and right of access claims he had previously alleged.

Finally, Petitioner inappropriately states that the court of appeals mischaracterized the record in referring to his tardy attempt to amend the complaint because he "never moved for leave to amend his second amended complaint" (Pet. Br., p. 27). The use of semantics to accuse a federal circuit court of appeals of "mischaracterizing the record" is a highly objectionable practice. Whether Petitioner formally petitioned the court for leave to replead is immaterial, in light of the fact that Petitioner indisputably attempted to persuade the district court to entertain his unreasonable seizure claim under *Brower*.

Moreover, the court of appeal's conclusion that Petitioner did, in fact, seek to amend his Second Amended Complaint is certainly supported by the record. Specifically, a June 22, 1993 order entered by the district court read, in part: "[i]n this case, after completion of discovery and on the eve of trial, Plaintiff seeks to amend the pleadings to include a brand new cause of action which he asserts was unknown to him prior to the completion of his expert's and Officer Noble's and Chief Hardesty's depositions. The Court disagrees that Plaintiff could only have learned of this claim during discovery. . . . Consequently, the Court finds that justice does not require that

Plaintiff be allowed to amend the pleadings to reflect a claim under *Brower*" (*See* Appendix A, District Court Order, June 22, 1993, p. 3).

Regardless of whether Petitioner formally sought to amend the pleadings, or whether he carelessly sought to pursue the new claim without bothering to seek a formal amendment, the court of appeals correctly upheld the district court's refusal to entertain Petitioner's tardy *Brower* claim.

V.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S REFUSAL TO JOIN ANOTHER PARTY TO THE CASE.

Petitioners Thompson and Bailey both contend that the court of appeals incorrectly affirmed the district court's refusal to add Bailey to the lawsuit as an additional Plaintiff (Pet. Br., p. 30).

The district court has wide discretion concerning the joinder of parties. *See, e.g., Intercon Research Associates, Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 56 (7th Cir. 1982). A party may be joined if he has a right arising out of the same transaction or series of transactions as the initial plaintiff, and "if any question of law or fact common to all these persons will arise in the action." Fed. R. Civ. P. 20(a); *See also Intercon*, 696 F.2d at 56-7.

In the instant case, the district court properly denied the joinder of another party to the case. Petitioner Bailey alleged an incident of excessive force completely independent of Petitioner Thompson's claim which occurred almost two years after Thompson's encounter with Respondents. Furthermore, Bailey's claim involved a completely different set of facts and additional Defendants. As the

Seventh Circuit noted, "adding Bailey to the lawsuit would only serve to confuse the jury by trying two separate and distinct injury claims." 33 F.3d at 858.

Petitioner incorrectly relies on Wright & Miller for the proposition that "no prior case has ever denied joinder of plaintiffs in a civil rights case alleging separate injury by the same policy" (Pet. Br., p. 30). On the contrary, Wright & Miller simply states generally that joinder has been allowed in cases involving violations of federal statutes, including the Civil Rights Act. 7 Wright, Miller & Kane, *Federal Practice and Procedure*, § 1656, p. 398, n. 23 & 26 (1994 Supp. n. 25, p. 39). At no time does Wright & Miller retreat from the rule conditioning joinder on a showing of a right arising out of the same transaction or series of transactions which gave rise to the original Plaintiff's claim.

In this case, the transactions giving rise to Petitioners' claims took place more than two years apart. The incidents had nothing in common other than the fact that Respondent Boggs was involved in both incidents. The sole fact of a common Defendant is far too tenuous a thread on which to seek joinder. Accordingly, the Seventh Circuit did not err when it affirmed the district court's decision to deny Brad Bailey's motion to join Petitioner Thompson's suit.

CONCLUSION

The Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

[Filed June 22, 1993]

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF
ILLINOIS—SPRINGFIELD DIVISION

ROBERT THOMPSON,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
	)	No. 91-3196
ROD BOGGS, a Police Officer of the City of Havana, in His Individual Capacity, et al.,	)	
	)	
Defendants.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on the parties' cross-motions for partial summary judgment pursuant to Fed. R. Civ. P. 56, and Plaintiff's motion to strike certain material submitted by Defendants in their response to his motion pursuant to Rule 56(e). The Court has previously detailed the facts of this case in its order of October 28, 1991; consequently, they will not be repeated.

Plaintiff contends that due to the depositions of Defendant Officer Noble and Chief Hardesty taken on December 4, 1992 and December 10, 1992 respectively, and the

opinion of his expert Mr. Ken Katsaris, he is entitled to summary judgment for a claim of unreasonable seizure arising from Defendant Noble's use of his squad car to block Plaintiff from successfully escaping from the police through the hospital parking lot. Defendants assert that Plaintiff's claim for unreasonable seizure is barred by the statute of limitations since it has been raised for the first time approximately three years and nine months after the initial occurrence. In addition, Defendants argue that a question of fact remains over whether Officer Noble's acts were reasonable. Finally, Defendants maintain that the City and Chief Hardesty are not liable for Officer Noble's actions. Plaintiff counters that the portion of Defendants' response which calculates that he had sufficient time to stop without hitting the roadblock should be stricken as inadmissible hearsay.

Initially, the Court disagrees with Officer Noble's assertion that he was dismissed from the case because the only claims against him, falsifying a police report and not reporting Officer Boggs' alleged use of excessive force to his superiors, were dismissed. The complaint clearly states at ¶ 43 that Officer Noble violated Plaintiff's right to be free from unreasonable searches and seizures when he failed to prevent Officer Boggs' excessive use of force at the scene. Moreover, the Court never dismissed Officer Noble from this case. Thus, the issue is whether this claim gives Defendants' notice of Plaintiff's roadblock/seizure claim, and, if not, whether the Court will allow Plaintiff to amend the pleadings on the eve of trial.

The claims specifically alleged against Officer Noble in Plaintiff's complaint are for violations of the Plaintiff's right to be free from unreasonable searches and seizure due to Officer Noble's failure to prevent Officer Boggs' use of excessive force, and for a violation of Plaintiff's

right to access to the courts. Moreover, Plaintiff's own outline of his claims contained within his second amended complaint mentions only that Officer Noble violated the Fourth Amendment for failing to prevent a fellow officer's use of excessive force and that he denied Plaintiff access to the courts. (Plaintiff's Response to Defendant's Motion to Dismiss Second Amended Complaint, at 2). The latter claim was dismissed by the Court on May 7, 1992.

The Federal Rules allow the amendment of pleadings providing the other party is not prejudiced. This case is distinguishable from *Ash v. Wallenmeyer*, 879 F.2d 272 (7th Cir. 1989), cited by Plaintiff to support his contention that his claim for unreasonable seizure should be allowed. In *Ash*, Plaintiff moved to amend the amount of damages sought, not the underlying claim. *Ash*, 879 F.2d at 274.

In this case, after completion of discovery and on the eve of trial, Plaintiff seeks to amend the pleadings to include a brand new cause of action which he asserts was unknown to him prior to the completion of his expert's and Officer Noble's and Chief Hardesty's depositions. The Court disagrees that Plaintiff could only have learned of this claim during discovery. Rather, Plaintiff was aware that Officer Noble used his car as a roadblock from the beginning of the case. Moreover, the case of *Brower v. County of Inyo*, 109 S. Ct. 1378 (1989), which Plaintiff states allows his claim for unreasonable seizure due to the use of a roadblock to stop him, was decided prior to the filing of this suit. Consequently, the Court finds that justice does not require that Plaintiff be allowed to amend the pleadings to reflect a claim under *Brower*.

Additionally, Court notes that under *Monell v. Dept. of Social Serv.*, 436 U.S. 658 (1978) and *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988), the City and Chief Hardesty

would not be liable because there is no evidence of a custom, policy, or practice concerning improper roadblocks and no evidence that Chief Hardesty acted with deliberate, reckless indifference with respect to procedures concerning police roadblocks.

Ergo, Plaintiff's motion for partial summary judgment (d/e 46) is DENIED. Plaintiff will not be allowed to amend his pleadings at this late date to include a claim for unreasonable seizure against Defendant Noble. Plaintiff's motion to strike (d/e 66) is DENIED. Defendants' motion for summary judgment (d/e 63) is DENIED as moot.

ENTER: 22 June, 1993
FOR THE COURT:

/s/ Richard Mills
United States District Judge